NOVA SCOTIA

Service Nova Scotia
and Municipal Relations

SUMMARY OF RECOMMENDATIONS

NOVA SCOTIA *COMPANIES ACT* DISCUSSION PAPER

2005

Crown copyright © 2005, Province of Nova Scotia, all rights reserved.

NOVA SCOTIA

Service Nova Scotia
and Municipal Relations

SUMMARY OF RECOMMENDATIONS

NOVA SCOTIA *COMPANIES ACT* DISCUSSION PAPER

2005

Crown copyright © 2005, Province of Nova Scotia, all rights reserved.

Service Nova Scotia and Municipal Relations ("SNSMR"), in collaboration with the Nova Scotia Barristers' Society, is undertaking a review of the Nova Scotia *Companies Act* ("NSCA"). This review will identify potential amendments to the NSCA that will bring about efficiencies to incorporation and registration processes for Nova Scotia companies. A discussion paper has been prepared for SNSMR by Cox Hanson O'Reilly Matheson that provides analysis and recommendations on specific areas of concern.

This is an extract of the Summary of Recommendations contained in the discussion paper. The chapters of the discussion paper noted below examine each topic in greater detail and include excerpts from the statutes of Nova Scotia and other jurisdictions.

Copies of the discussion paper are available on line from the Registry of Joint Stock Companies website at www.rjsc.ca or by telephoning (902) 424-5223.

We welcome your comments on the discussion paper and the *Companies Act* Review. To provide input or for further information please contact:

Kerry MacLean
Registrar of Joint Stock Companies
Service Nova Scotia and Municipal Relations
1505 Barrington Street, 9th Floor South
PO Box 1529
Halifax, Nova Scotia
B3J 2Y4
Phone (902)424-7742
Fax (902)424-0523
Email: joint-stocks@gov.ns.ca

SUMMARY OF RECOMMENDATIONS

NOVA SCOTIA *COMPANIES ACT* DISCUSSION PAPER

A. THE ROLE OF THE COURT IN AMALGAMATIONS AND FUNDAMENTAL CHANGES OF ULCS (CHAPTER 3)

Under the NSCA, companies must obtain court approval for amalgamation. Chapter 3 provides a summary of the law in this area, in Nova Scotia and in other jurisdictions, in order to determine whether it is necessary to continue involving the courts in amalgamations or whether Nova Scotia should follow other jurisdictions in Canada and eliminate the courts' role in this area. We have also included a discussion of the courts' role with respect to fundamental changes of ULCs.

Traditionally, the rationale for requiring court approval for amalgamations was the protection of shareholders and creditors. However, as a result of multiple amendments to the statutes in other jurisdictions, supplementary provisions have been added which provide sufficient protection of the right of shareholders and creditors. These provisions include a shareholder's right to dissent and the oppression remedy, both of which appear in the Third Schedule to the NSCA at sections 2 and 5. Other jurisdictions have addressed the issue of protecting the interests of those who may be prejudiced by the amalgamation by requiring solvency tests and statutory declarations to the effect that the amalgamation will not prejudice creditors or that creditors have been notified, and that shareholder approval has been obtained.

The amalgamation process under the NSCA is used primarily by two groups: Nova Scotia companies with local shareholders, and Nova Scotia companies owned by extra-jurisdictional shareholders, who are creating ULCs for tax purposes. Until recently, Nova Scotia was the only jurisdiction in which ULCs were able to be created. ULCs are now permitted in Alberta and other jurisdictions are considering the introduction of similar legislation.

Of the two existing methods for the conversion of an existing limited company to a ULC under the NSCA, amalgamations are by far the most common. The second method is the creation of a ULC by way of a plan of arrangement under section 130 of the NSCA. The plan of arrangement avoids some of the difficulties associated with the amalgamation procedure, but it is still not a straightforward process. One of the concerns expressed by members of the Nova Scotia Bar with respect to ULCs is that our process is unnecessarily complex and we may be at risk of losing our current status as a jurisdiction of choice for ULCs.

Given the uses to which the amalgamation procedure is currently put and the importance to Nova Scotia of ensuring that reorganizations be permitted as simply and efficiently as possible so long as the rights of creditors, shareholders and others remain protected, we make the following recommendations:

1. The current amalgamation procedure should be retained, as it allows for flexibility;

2. The current amalgamation procedure should also be supplemented by a second, alternative procedure, which mirrors that found in CBCA-type statutes and allows for amalgamation

    (a) upon approval of the amalgamation by a special resolution of the shareholders of each company involved, or by a directors' resolution where the companies are related, and

    (b) upon the filing of an amalgamation agreement to which are attached the memorandum and articles of association of the (proposed) amalgamated company, as well as a statutory declaration of an officer or director of each company indicating that the company will be able to meet a solvency test on amalgamation and that creditors either will not be prejudiced by the amalgamation or have been notified of the proposed amalgamation and have not objected;

3. The current method of creation of a ULC should be simplified to allow:

    (a) an existing Nova Scotia limited company to convert to a ULC by altering its memorandum of association through a unanimous resolution of the shareholders;

    (b) an extra-jurisdictional company to elect to become a ULC upon continuance; or

    (c) an existing Nova Scotia limited company to re-register as a ULC; and

4. The Province should reconsider the amount which should be charged for the incorporation of a ULC (currently $6,000.00), especially if it becomes apparent that a ULC may be incorporated in other jurisdictions at a lower cost. It should also reconsider the amount of the annual registration fee or tax (currently $2,000.00).

B. THE ROLE OF THE COURT IN REDUCTIONS OF CAPITAL (CHAPTER 4)

Nova Scotia is the last jurisdiction in Canada where reductions of a company's capital require court approval. The primary purpose of the court's involvement is to ensure that the interests of creditors and members of the company are protected by preventing the company from being "stripped" of its assets. Other jurisdictions in Canada address creditor and member concerns by (1) placing statutory restrictions on when capital may be reduced; (2) providing creditor remedies in the event capital is distributed contrary to the legislated criteria; and (3) through the provision of oppression remedies in cases where the conduct of the majority of the shareholders of the company is oppressive or unfairly prejudicial to the interests of certain minority shareholders.

Chapter 4 examines reductions of share capital only, and does not consider distribution of a company's property *in specie* pursuant to paragraphs 19(1)(g) and 26(4)(h) of the NSCA. However, these provisions state that the distribution of a company's property *in specie* is subject to the same rules as those imposed for reductions of capital.

The traditional reason for the requirement for court involvement in reductions of share capital is the protection of creditors and shareholders. Creditors are entitled to assume that the capital of the company will not be impaired, and shareholders are entitled to assume that the capital they contributed to the company will not be paid out except for *bona fide* commercial purposes.

The underlying principles to be applied to amendments of the NSCA with respect to reductions of share capital should include efficiency, creditor protection and minority shareholder protection. To preserve these principles, we suggest that consideration be given to adopting provisions similar to those in the BCBCA, which endeavours to provide flexibility through permitting reductions of capital by way of both special resolution and court order.

In order to protect the interests of creditors where a reduction is by special resolution, a company should be required to meet reasonable financial tests before the reduction can occur. The interests of creditors may be further protected by placing liability for reductions made contrary to stated financial tests on the shareholders of the company. On the other hand, no amendments are required to the NSCA to ensure the protection of shareholders in reduction of capital proceedings, given the protection afforded in the Third Schedule.

Based on the foregoing, we propose that sections 57-67 of the NSCA be repealed and replaced with provisions that include the following:

(a) Reduction of Capital Provision: This provision should be based on subsection 74(1) of the BCBCA, with the financial test in subsection 74(1)(b) replaced with financial tests similar to those found in subsection 38(3) of the CBCA.

(b) Shareholder Liability: A provision similar to subsection 38(4) of the CBCA should be included in the NSCA amendments such that shareholders are liable for reductions made contrary to the NSCA. Under subsection 38(4) creditors can compel shareholders to repay or redeliver money or property paid or distributed as a reduction of capital.

There does not appear to be any reason to remove section 49 from the NSCA, although its usefulness in today's modern business climate is unknown. We suggest, however, that the provision be amended to clarify what is meant by "memorandum" and whether court approval is required.

We recommend that a provision be added to the NSCA stating that a ULC may reduce its capital simply by passing a special resolution to that effect and expressly providing that court approval of the resolution is not required.
There remains some uncertainty surrounding reductions of capital by way of redemption of shares for ULCs pursuant to subsection 51(5) and (6). We recommend that these provisions be amended by simply changing "company" to "company limited by shares".

C. THE ROLE OF THE COURT IN THE RESTORATION OF STRUCK-OFF COMPANIES (CHAPTER 5)

Subsection 136(4) of the NSCA allows the restoration of the name of a struck-off company upon application to the court for approval. No other jurisdiction in Canada requires court approval for the restoration of a struck-off corporation. Most jurisdictions allow the restoration of a corporation on application to the director or registrar under the governing legislation, upon the provision of certain documents. In general, the other Canadian jurisdictions which allow restoration of a company which has been struck off the register follow a relatively simple procedure of applying to the registrar or director, as applicable, with supporting documentation, upon receipt of which the registrar or director either may or must reinstate the registration of the company. The BCBCA follows a hybrid system and permits restoration either by application to the registrar or by application to the court, with the registrar's approval.

We recommend that the provisions of the NSCA be amended to permit the application for restoration to be made to the Registrar of Joint Stock Companies (the "Registrar"). Upon being restored by the Registrar, the company would continue as if it had never been struck off, with the proviso currently found in the NSCA protecting those who may have acquired from the Province assets which escheated to the Province upon the initial dissolution.

We have also recommended consideration of a provision in the *Corporations Registration Act* which would permit the Registrar to determine that the Certificate of Registration under that Act is deemed not to have been revoked.

This chapter also contains a recommendation that these decisions (and decisions of a similar nature by the Registrar) should be reviewed by the court upon application by any aggrieved person, similar to provisions contained in the CBCA and other statutes.

D. THE ROLE OF THE COURT IN THE ALTERATION OF THE MEMORANDUM OF ASSOCIATION (CHAPTER 6)

A Nova Scotia company may not alter its memorandum except as provided for in the NSCA (section 14). Section 19 of the NSCA lists the circumstances when a company may, by special resolution, alter its memorandum. Such alteration must be approved by a court, except where the company wishes to change to a company which has the capacity, rights, powers and privileges of a natural person.

Other Canadian jurisdictions allow alterations of a corporation's articles of incorporation either by special resolution, resolution of shareholders, or resolution of directors, depending on the nature of the amendment. Under the UKCA, a company may alter its memorandum by special resolution, and court approval is only required if minority shareholders make an application to the court for a review. Similarly, in Delaware, New York, and Florida, amendments may be made to a company's Certificate of Incorporation (the equivalent of the memorandum of association) with director and/or shareholder approval.

We have not found any discussion of the historic reasons for which the court's approval is required for alterations to a company's memorandum of association under the NSCA. None of the alterations contemplated under section 19 constitutes a fundamental change to the company such that the interests of shareholders would be endangered. Paragraph 19(1)(i) allows a company to alter the provisions of its memorandum to enable it to amalgamate with any other company or body of persons. This, although it is linked to a fundamental change, is not in itself a fundamental change. Most of the alterations in subsection 19(1) are directly related to business efficiencies of the company. The only change which does not fall into that category is under paragraph 19(1)(j), which allows a company to change to a company which has the capacity, rights, powers and privileges of a natural person; this is also the only change which currently does not require court approval. There seems to be no valid reason why alterations to the memorandum of association require court approval. Because the alterations do not result in fundamental changes to the company, and because they are related to business decisions of the company, requiring the court's approval would seem to contradict the tradition in companies law of leaving the direction of a company to the company itself, where the rights of shareholders and creditors will not be prejudiced. Allowing alterations to the memorandum of association by special resolution should be sufficient to protect the shareholders' interests.

The foregoing comments apply only to subsection 19(1) as it currently reads. If subsection 19(1) is amended to allow an alteration of the memorandum of association to change a company from limited liability to unlimited liability, this particular alteration should require approval by unanimous shareholder resolution, as discussed in Chapter 3.

RECOMMENDATION

For the above reasons, we recommend that subsection 19(4) be amended to read to the following effect:

> (4) An alteration made pursuant to clause (j) [and (k), if the NSCA is amended to allow a company to change from limited to unlimited liability by way of unanimous shareholders' resolution] of subsection (1) shall not take effect until and except insofar as it is approved by all of the members of the company, whether or not the shares held by them otherwise carry the right to vote, and where an alteration is made in this manner the company is subject to subsections (8) to (12) of Section 26.

E. FINANCING SHARE PURCHASES (CHAPTER 7)

The issue examined in Chapter 7 is whether it is appropriate under the NSCA to allow companies to assist in the financing of the purchase of their own shares without the solvency tests currently required by subsection 110(5). This discussion includes a comparison of the Nova Scotia provision with similar provisions in other Canadian jurisdictions and how those jurisdictions have either repealed or amended them, with respect specifically to the solvency tests, and whether approaches taken in other parts of Canada would be useful in Nova Scotia.

This chapter reviews provisions requiring certain disclosure following the granting of financial assistance which is a requirement in Saskatchewan, Alberta, Ontario and British Columbia. It also considers the repeal of such provisions under the CBCA. This chapter contains a recommendation that there be a definition of financial assistance and an express statement that financial assistance may be permitted. We recommend that there not be any statutory restriction on the ability of a company to provide financial assistance.

In order to make it clear that creditors may apply under the provisions of the Third Schedule in this and other areas, the chapter also includes a recommendation to specifically include creditors in the definition of "complainant" in subsection 7(5) of the Third Schedule.

F. CAPITAL OF CONTINUING COMPANIES (CHAPTER 8)

Chapter 8 examines the concerns raised by certain members of the Nova Scotia Bar about the lack of certainty in the NSCA with respect to the share capital of companies continuing into Nova Scotia. We have reviewed how legislation in other jurisdictions in Canada has addressed share capital for continued companies, and recommend that the NSCA be revised to include a provision similar to those found in the CBCA, OBCA and ABCA requiring a company to expressly state what the paid-up capital of a company continuing under Nova Scotia law shall be following continuance.

As noted above, the NSCA embodies the concept of paid-up capital as opposed to stated capital. With this in mind, we recommend that paragraph 133(4)(b) of the NSCA be revised to the following effect:

> (b) For the purposes of this subsection (4) of Section 133, "paid-up capital" shall be the aggregate amount of the consideration for the issue and allotment of shares of each class and series of shares of the company and, for greater certainty, shall include all amounts included as paid-up capital or stated capital in the jurisdiction of the company immediately prior to continuance.

G. AUTHORIZED CAPITAL LIMITS (CHAPTER 9)

Nova Scotia and Prince Edward Island are the only two jurisdictions left in Canada which prescribe that a company's constating documents must set out its maximum authorized capital. In other jurisdictions, companies are permitted to cap authorized capital, but it is not mandatory to do so. This cap on authorized capital is a carry-over from British companies' law, and originally served as a form of protection for investors by preventing dilution of shareholder interests through an increase in authorized capital absent a shareholders' resolution. Until 1983, annual fees payable pursuant to the Nova Scotia *Corporations Registration Act* were calculated on the basis of the nominal capital of a company. The annual registration fee is now a fixed amount and is no longer based on the nominal capital of a company.

We recommend that legislators in Nova Scotia follow the lead of legislators in other jurisdictions in Canada by eliminating the requirement that companies incorporated under the NSCA specify a limit on their authorized capital. The cap is not in line with other jurisdictions in Canada, an issue that frequently arises when companies continue into Nova Scotia. Further, investors can be more suitably protected by pre-emptive provisions similar to those found in the CBCA.

With this in mind, we recommend that paragraphs 10(a)(iv) to (vi) of the NSCA be revised to the following effect:

> 10 In the case of a company limited by shares,
>
> (a) the memorandum must state
>
> (iv) for each class and series of shares with or without nominal or par value, the maximum number of the shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

Further, we recommend the deletion of subsections 20(3) and (4) of the NSCA and the inclusion of a pre-emptive right section similar to section 28 of the CBCA. We recommend this provision be inserted as section 51A and read to the following effect:

> 51A If the articles so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.

> (2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued
>
> (a) for consideration other than money;
>
> (b) as a share dividend; or
> (c) pursuant to the exercise of conversion privileges, options or rights previously granted by the company.

Consideration should be given to amending paragraph 134(3)(c) of the NSCA to read to the following effect:

> 134 (3) The amalgamation agreement shall further set out
>
> (c) for each class and series of shares with or without nominal or par value, the maximum number of shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

H. SPECIAL RESOLUTIONS AND SHAREHOLDERS' AND DIRECTORS' MEETINGS (CHAPTER 10)

Under the NSCA, a special resolution must be passed by no less than three-quarters of the members present at a general meeting and confirmed at a subsequent meeting by a majority of members present, or it must be in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting. In most other jurisdictions in Canada, a special resolution requires no less than two-thirds of the votes of shareholders in order to pass, and in no other Canadian jurisdiction is the confirmatory meeting required.

It is recommended that the current requirement for three-quarters of the votes of shareholders be reduced to two-thirds, if for no other reason than to reduce the number of inconsistencies between the NSCA and the majority of other Canadian statutes. We further recommend that the requirement for confirmatory meetings be removed from the NSCA, as the protection of shareholders, which is the aim of the confirmatory meetings, is already built in to the definition of special resolutions. This definition requires that notice be given to all shareholders specifying the intention to propose a resolution as a special resolution at a general meeting.

Currently, there is no provision in the NSCA allowing for meetings of shareholders or directors to be held by electronic means. Some Canadian jurisdictions allow electronic meetings; others do not go as far, but they do allow more flexibility than requiring meetings to be held in person (for example, meetings may be held via telephonic or other communication facilities). Most other jurisdictions in Canada have turned their attention to the issue of modernizing their statutes to reflect technological advances. To facilitate meetings of shareholders and directors, who are frequently not present in the same jurisdiction, it would be advisable for the NSCA to be amended to allow for meetings to take place by telephone or by electronic means which allow instantaneous communication. There should also be a provision deeming a shareholder or director who participates in a meeting by such means to have been present at the meeting.

I. DOCUMENTS TO BE AVAILABLE AT THE REGISTERED OFFICE (CHAPTER 11)

Subsections 43(1) and 90(1) of the NSCA require the register of members to be kept at the registered office of the company and to be available for inspection by members of the public. This does not cause a problem with privately held companies, since shares are transferable at the registered office. However, in the case of public companies where the transfer agent is a trust company, the transfer of shares does not normally take place at the registered office, and it has been suggested that allowing the register of members or a copy of the register to be kept elsewhere than at the registered office would facilitate such companies' business practices. The question addressed in Chapter 11 is whether a removal of the restrictions on the location of the register of members is warranted.

Most other jurisdictions in Canada allow flexibility for the location of the share register, so long as the location is controlled by the directors of the company. Most of these jurisdictions, however, restrict the location of the records to within Canada and, in most cases, within the applicable jurisdiction.

Given that there are situations where it would be more convenient and efficient to have the share register of a company held at a location other than the registered office, and given that there is no apparent need to retain the share register at the registered office, it is recommended that the Province consider relaxing the restrictions of location with respect to the register. An amendment should be made to the NSCA allowing the share register to be kept at a location in Canada other than the registered office, where such location is designated by the directors. This will allow greater flexibility for the company while retaining some control over the register. It would also be desirable to require the register and other documents, if located somewhere other than the registered office, to be accessible via computer terminal at the registered office during business hours. This will allow all records of the company to be accessible from the registered office at all times, even if not physically present therein.

J. ACCESS TO THE SHARE REGISTER (CHAPTER 12)

In Nova Scotia, access to the register of members is available to anybody, and anybody may make a copy of the register for a small charge. Refusal to allow access to the register makes the company and any director and manager of the company who knowingly authorized or permitted the refusal liable for a small penalty. If a person wishes to commence a proceeding for a remedy with respect to the refusal of access, that person must first obtain leave in writing of the Attorney General. These requirements are set out in section 43 of the NSCA.

There is no obvious reason why the requirement for the participation of the Attorney General should be retained. It would be preferable to follow the examples set by other jurisdictions, specifically British Columbia, as the procedure in that province is more straightforward, quicker, and presumably less expensive. Such an approach allows a complainant to make an application to the registrar for a compliance order and, where the registrar is unable or unwilling to provide the compliance order, to then have recourse to the court system directly. We recommend that the NSCA adopt the approach taken in the BCBCA and that subsection 43(5) be repealed and replaced with a provision allowing recourse to the Registrar where there has been a breach of the provisions allowing access to the share register, following in general the approach taken under the BCBCA. We also recommend the addition of a provision allowing an application to the court for a compliance order in a summary manner, as included in the CBCA-type statutes and the BCBCA.

We also recommend that only the Registrar, directors, shareholders and creditors of a company and their personal representatives be permitted to examine the share register, unless the company is a distributing corporation. In the case of a distributing corporation, any person should be entitled to obtain a list setting out the names of the shareholders of the company, the number of shares owned by each and the address of each shareholder or member.

PROPOSALS FOR AMENDMENTS TO THE
NOVA SCOTIA COMPANIES ACT

A DISCUSSION PAPER

2005

Prepared for Service Nova Scotia and Municipal Relations

by

COX HANSON O'REILLY MATHESON

Crown copyright © 2005, Province of Nova Scotia, all rights reserved.

TABLE OF CONTENTS

1. INTRODUCTION .... - 1 -
2. SUMMARY OF RECOMMENDATIONS .... - 4 -
   A. The Role of the Court in Amalgamations and Fundamental Changes of ULCs (Chapter 3) .... - 4 -
   B. The Role of the Court in Reductions of Capital (Chapter 4) .... - 5 -
   C. The Role of the Court in the Restoration of Struck-Off Companies (Chapter 5) .... - 7 -
   D. The Role of the Court in The Alteration of the Memorandum of Association (Chapter 6) - 8 -
      Recommendation .... - 9 -
   E. Financing Share Purchases (Chapter 7) .... - 9 -
   F. Capital of Continuing Companies (Chapter 8) .... - 9 -
   G. Authorized Capital Limits (Chapter 9) .... - 10 -
   H. Special Resolutions and Shareholders' and Directors' Meetings (Chapter 10) .... - 12 -
   I. Documents to be available at the Registered Office (Chapter 11) .... - 12 -
   J. Access to the Share Register (Chapter 12) .... - 13 -
3. THE ROLE OF THE COURT IN AMALGAMATIONS AND FUNDAMENTAL CHANGES OF ULCS .... - 15 -
   A. Introduction .... - 15 -
   B. Nova Scotia .... - 15 -
   C. Other Jurisdictions .... - 16 -
      Federal .... - 16 -
      Alberta .... - 17 -
      British Columbia .... - 17 -
      Other Provinces .... - 19 -
   D. Discussion .... - 19 -
   E. Unlimited Liability Companies .... - 22 -
   F. Recommendations .... - 25 -
         Appendix "A" .... - 27 -
         Appendix "B" .... - 31 -
         Appendix "C" .... - 36 -
         Appendix "D" .... - 37 -
         Appendix "E" .... - 48 -
         Appendix "F" .... - 53 -
4. THE ROLE OF THE COURT IN REDUCTIONS OF CAPITAL .... - 55 -
   A. Introduction .... - 55 -
   B. NSCA .... - 58 -
      Sections 57-67 .... - 58 -
      Section 49 .... - 64 -
      Section 51 .... - 65 -
   C. Reductions of Capital by Unlimited Liability Companies .... - 65 -
   D. Other Jurisdictions .... - 67 -
      Canada .... - 67 -
      Alberta .... - 68 -

5. Amend Third Schedule subsection 7(5) .... - 125 -
C. Recommendations .... - 125 -
Appendix "A" .... - 126 -
Appendix "B" .... - 128 -
Appendix "C" .... - 131 -
8. CAPITAL OF CONTINUING COMPANIES .... - 135 -
A. Introduction .... - 135 -
B. NSCA .... - 135 -
C. Other Jurisdictions .... - 135 -
D. Recommendation .... - 138 -
9. AUTHORIZED CAPITAL LIMITS .... - 140 -
A. Introduction .... - 140 -
B. NSCA .... - 140 -
C. Other Jurisdictions .... - 141 -
D. Recommendation .... - 142 -
10. SPECIAL RESOLUTIONS AND SHAREHOLDERS' AND DIRECTORS' MEETINGS .... - 144 -
A. Special Resolutions .... - 144 -
Recommendation .... - 146 -
B. Confirmatory Meetings .... - 146 -
Recommendation .... - 147 -
C. Electronic Meetings .... - 147 -
Recommendation .... - 148 -
11. DOCUMENTS TO BE AVAILABLE AT THE REGISTERED OFFICE .... - 149 -
A. Nova Scotia .... - 149 -
B. Other Jurisdictions .... - 150 -
C. Discussion and Recommendation .... - 151 -
Appendix "A" .... - 152 -
Appendix "B" .... - 156 -
12. ACCESS TO THE SHARE REGISTER .... - 157 -
A. Nova Scotia .... - 157 -
B. Other Jurisdictions .... - 158 -
C. Discussion .... - 159 -
D. Privacy Considerations .... - 159 -
E. Recommendation .... - 160 -
Appendix "A" .... - 161 -

1. INTRODUCTION

This discussion paper has been prepared at the request of Service Nova Scotia and Municipal Relations ("SNSMR") on particular topics relating to possible amendments to the Nova Scotia Companies Act, R.S.N.S. 1989, c. 81 (the "NSCA"), which would bring about efficiencies with respect to incorporation and registration processes for companies existing under the NSCA.

The paper covers only the specific areas suggested by SNSMR as requiring the most immediate attention. It is not intended to be an exhaustive review of the NSCA, nor is it meant to reflect a wholesale reform initiative. SNSMR has determined that wholesale reform of the NSCA is inappropriate at this time.

The topics requested to be addressed are the following:

1. Role of the courts in companies law – the detailed discussion of the areas addressed are found in chapters 3 to 6, namely:

    (a) Amalgamations (Chapter 3);

    (b) Reductions of Capital (Chapter 4);

    (c) Restoration of Struck-off Companies (Chapter 5); and

    (d) Alteration of the Memorandum of Association (Chapter 6).

2. Issues involving share capital, namely:

    (a) Financing share purchases (Chapter 7) – whether a company should be permitted to finance the purchase of the shares in the capital of the company without meeting the solvency test presently required;

    (b) Capital of continuing companies (Chapter 8) – how capital should be stated on continuance documents when companies from other jurisdictions continue under the NSCA; and

    (c) Authorized share capital limits (Chapter 9) – whether there should continue to be a mandatory upper limit on the amount of share capital.

3. Meetings of shareholders and directors (Chapter 10) – this chapter reviews the requirements under the NSCA for confirmatory meetings and special resolutions as well as the current requirement of a three-fourths vote for the passing of a special resolution. In addition, this chapter considers a possible provision for the introduction of electronic meetings.

4. Registered Office (Chapter 11) – this chapter reviews certain of the documents required to be maintained at the Registered Office and considers whether present

5. restrictions with respect to dealing with the location of the register of members should be maintained.

6. Access to the Share Register (Chapter 12) – this chapter considers the current provisions of the NSCA which permit any person to inspect or obtain a copy of a company's register of members.

7. Fundamental changes of unlimited liability companies (Chapter 3) – provisions in the NSCA concerning ULCs are considered in Chapter 3, which also deals with amalgamations involving ULCs. Until relatively recently, most limited liability companies which converted to ULCs did so through the process of amalgamation. A discussion of a simpler method is included in this chapter as well as a discussion on simplifying certain other fundamental changes of ULCs. A discussion of issues relating to the reduction of capital of ULCs is included in Chapter 4.

In recent months there has been renewed discussion about the desirability of streamlining certain processes involving ULCs. This discussion is, at least in part, the result of developments in other jurisdictions. Effective May 17, 2005, the Business Corporations Amendment Act 2005 of Alberta came into force which contains provisions for the formation of unlimited liability corporations under the Alberta Business Corporations Act. Until this point, Nova Scotia had been the only province in recent years which allowed the incorporation of ULCs. This has proven to be a significant source of business for the province, given the attraction to foreign corporations of incorporating unlimited liability holding companies which enjoy special status under the US tax laws. There are significant differences between an unlimited liability corporation now permitted under the ABCA and a Nova Scotia ULC. This paper does not embark on a detailed analysis of the differences, but it does refer from time to time to the Business Corporations Amendment Act as "Alberta's Bill 16" or "Chapter 8 of the Statutes of Alberta 2005".

On October 9, 2002, representatives of the Service Nova Scotia & Municipal Relations Liaison Committee (a committee of the Nova Scotia Barristers' Society) wrote to certain members of the Bar requesting comments and suggestions on specific areas of potential reform to the NSCA. Many of these areas have been included in this discussion paper and we have taken into consideration the responses to the October 9 letter in formulating many recommendations.

The paper also takes into consideration recent reforms in other jurisdictions in Canada. We have attempted to present the evolution of the law in Nova Scotia and in other jurisdictions, and we include our recommendations for following or not following, in whole or in part, trends in evidence outside the Province.

As indicated above, the Companies Act of Nova Scotia is referred to in this paper as the "NSCA". Similar definitions are used for the corporate legislation of the other Canadian jurisdictions and for the United Kingdom Companies Act. Definitions used are as follows:

Alberta Business Corporations Act ("ABCA"), R.S.A. 2000, c. B-9

British Columbia Company Act ("BCCA"), R.S.B.C. 1996, c. 62 – now repealed

British Columbia Business Corporations Act ("BCBCA"), S.B.C. 2002, c. 57

Canada Business Corporations Act ("CBCA"), R.S.C. 1985 c. C-44

Manitoba Corporations Act ("MCA"), C.C.S.M., c. C225

New Brunswick Business Corporations Act ("NBBCA"), S.N.B. 1981, c. B-9.1

Newfoundland & Labrador Corporations Act ("NLCA"), R.S.N.L. 1990, c. C-36

Northwest Territories Business Corporations Act ("NTBCA"), S.N.W.T. 1996, c.19

Ontario Business Corporations Act ("OBCA"), R.S.O. 1990, c. B.16

Prince Edward Island Companies Act ("PEICA"), R.S.P.E.I. 1988, c. C-14

Quebec Companies Act ("QCA"), R.S.Q., c. C-38

Saskatchewan Business Corporations Act ("SBCA"), R.S.S. 1978, c. B-10

United Kingdom Companies Act 1985 ("UKCA"), 1985, c.6

Yukon Business Corporations Act ("YBCA"), R.S.Y. 2002, c.20

2. SUMMARY OF RECOMMENDATIONS

This chapter contains a summary of the recommendations for each topic covered in this paper. Subsequent chapters examine each topic in greater detail, and include excerpts from the statutes of Nova Scotia and other jurisdictions.

A. THE ROLE OF THE COURT IN AMALGAMATIONS AND FUNDAMENTAL CHANGES OF ULCS (CHAPTER 3)

Under the NSCA, companies must obtain court approval for amalgamation. Chapter 3 provides a summary of the law in this area, in Nova Scotia and in other jurisdictions, in order to determine whether it is necessary to continue involving the courts in amalgamations or whether Nova Scotia should follow other jurisdictions in Canada and eliminate the courts' role in this area. We have also included a discussion of the courts' role with respect to fundamental changes of ULCs.

Traditionally, the rationale for requiring court approval for amalgamations was the protection of shareholders and creditors. However, as a result of multiple amendments to the statutes in other jurisdictions, supplementary provisions have been added which provide sufficient protection of the right of shareholders and creditors. These provisions include a shareholder's right to dissent and the oppression remedy, both of which appear in the Third Schedule to the NSCA at sections 2 and 5. Other jurisdictions have addressed the issue of protecting the interests of those who may be prejudiced by the amalgamation by requiring solvency tests and statutory declarations to the effect that the amalgamation will not prejudice creditors or that creditors have been notified, and that shareholder approval has been obtained.

The amalgamation process under the NSCA is used primarily by two groups: Nova Scotia companies with local shareholders, and Nova Scotia companies owned by extra-jurisdictional shareholders, who are creating ULCs for tax purposes. Until recently, Nova Scotia was the only jurisdiction in which ULCs were able to be created. ULCs are now permitted in Alberta and other jurisdictions are considering the introduction of similar legislation.

Of the two existing methods for the conversion of an existing limited company to a ULC under the NSCA, amalgamations are by far the most common. The second method is the creation of a ULC by way of a plan of arrangement under section 130 of the NSCA. The plan of arrangement avoids some of the difficulties associated with the amalgamation procedure, but it is still not a straightforward process. One of the concerns expressed by members of the Nova Scotia Bar with respect to ULCs is that our process is unnecessarily complex and we may be at risk of losing our current status as a jurisdiction of choice for ULCs.

Given the uses to which the amalgamation procedure is currently put and the importance to Nova Scotia of ensuring that reorganizations be permitted as simply and efficiently as possible so long as the rights of creditors, shareholders and others remain protected, we make the following recommendations:

1. The current amalgamation procedure should be retained, as it allows for flexibility;

2. The current amalgamation procedure should also be supplemented by a second, alternative procedure, which mirrors that found in CBCA-type statutes and allows for amalgamation

    (a) upon approval of the amalgamation by a special resolution of the shareholders of each company involved, or by a directors' resolution where the companies are related, and

    (b) upon the filing of an amalgamation agreement to which are attached the memorandum and articles of association of the (proposed) amalgamated company, as well as a statutory declaration of an officer or director of each company indicating that the company will be able to meet a solvency test on amalgamation and that creditors either will not be prejudiced by the amalgamation or have been notified of the proposed amalgamation and have not objected;

3. The current method of creation of a ULC should be simplified to allow:

    (a) an existing Nova Scotia limited company to convert to a ULC by altering its memorandum of association through a unanimous resolution of the shareholders;

    (b) an extra-jurisdictional company to elect to become a ULC upon continuance; or

    (c) an existing Nova Scotia limited company to re-register as a ULC; and

4. The Province should reconsider the amount which should be charged for the incorporation of a ULC (currently $6,000.00), especially if it becomes apparent that a ULC may be incorporated in other jurisdictions at a lower cost. It should also reconsider the amount of the annual registration fee or tax (currently $2,000.00).

B. THE ROLE OF THE COURT IN REDUCTIONS OF CAPITAL (CHAPTER 4)

Nova Scotia is the last jurisdiction in Canada where reductions of a company's capital require court approval. The primary purpose of the court's involvement is to ensure that the interests of creditors and members of the company are protected by preventing the company from being "stripped" of its assets. Other jurisdictions in Canada address creditor and member concerns by (1) placing statutory restrictions on when capital may be reduced; (2) providing creditor remedies in the event capital is distributed contrary to the legislated criteria; and (3) through the provision of oppression remedies in cases where the conduct of the majority of the shareholders of the company is oppressive or unfairly prejudicial to the interests of certain minority shareholders.

Chapter 4 examines reductions of share capital only, and does not consider distribution of a company's property in specie pursuant to paragraphs 19(1)(g) and 26(4)(h) of the NSCA. However, these provisions state that the distribution of a company's property in specie is subject to the same rules as those imposed for reductions of capital.

The traditional reason for the requirement for court involvement in reductions of share capital is the protection of creditors and shareholders. Creditors are entitled to assume that the capital of the company will not be impaired, and shareholders are entitled to assume that the capital they contributed to the company will not be paid out except for bona fide commercial purposes.

The underlying principles to be applied to amendments of the NSCA with respect to reductions of share capital should include efficiency, creditor protection and minority shareholder protection. To preserve these principles, we suggest that consideration be given to adopting provisions similar to those in the BCBCA, which endeavours to provide flexibility through permitting reductions of capital by way of both special resolution and court order.

In order to protect the interests of creditors where a reduction is by special resolution, a company should be required to meet reasonable financial tests before the reduction can occur. The interests of creditors may be further protected by placing liability for reductions made contrary to stated financial tests on the shareholders of the company. On the other hand, no amendments are required to the NSCA to ensure the protection of shareholders in reduction of capital proceedings, given the protection afforded in the Third Schedule.

Based on the foregoing, we propose that sections 57-67 of the NSCA be repealed and replaced with provisions that include the following:

(a) Reduction of Capital Provision: This provision should be based on subsection 74(1) of the BCBCA, with the financial test in subsection 74(1)(b) replaced with financial tests similar to those found in subsection 38(3) of the CBCA.

(b) Shareholder Liability: A provision similar to subsection 38(4) of the CBCA should be included in the NSCA amendments such that shareholders are liable for reductions made contrary to the NSCA. Under subsection 38(4) creditors can compel shareholders to repay or redeliver money or property paid or distributed as a reduction of capital.

There does not appear to be any reason to remove section 49 from the NSCA, although its usefulness in today's modern business climate is unknown. We suggest, however, that the provision be amended to clarify what is meant by "memorandum" and whether court approval is required.

We recommend that a provision be added to the NSCA stating that a ULC may reduce its capital simply by passing a special resolution to that effect and expressly providing that court approval of the resolution is not required.
There remains some uncertainty surrounding reductions of capital by way of redemption of shares for ULCs pursuant to subsection 51(5) and (6). We recommend that these provisions be amended by simply changing "company" to "company limited by shares".

C. THE ROLE OF THE COURT IN THE RESTORATION OF STRUCK-OFF COMPANIES (CHAPTER 5)

Subsection 136(4) of the NSCA allows the restoration of the name of a struck-off company upon application to the court for approval. No other jurisdiction in Canada requires court approval for the restoration of a struck-off corporation. Most jurisdictions allow the restoration of a corporation on application to the director or registrar under the governing legislation, upon the provision of certain documents. In general, the other Canadian jurisdictions which allow restoration of a company which has been struck off the register follow a relatively simple procedure of applying to the registrar or director, as applicable, with supporting documentation, upon receipt of which the registrar or director either may or must reinstate the registration of the company. The BCBCA follows a hybrid system and permits restoration either by application to the registrar or by application to the court, with the registrar's approval.

We recommend that the provisions of the NSCA be amended to permit the application for restoration to be made to the Registrar of Joint Stock Companies (the "Registrar"). Upon being restored by the Registrar, the company would continue as if it had never been struck off, with the proviso currently found in the NSCA protecting those who may have acquired from the Province assets which escheated to the Province upon the initial dissolution.

We have also recommended consideration of a provision in the Corporations Registration Act which would permit the Registrar to determine that the Certificate of Registration under that Act is deemed not to have been revoked.

This chapter also contains a recommendation that these decisions (and decisions of a similar nature by the Registrar) should be reviewed by the court upon application by any aggrieved person, similar to provisions contained in the CBCA and other statutes.

D. THE ROLE OF THE COURT IN THE ALTERATION OF THE MEMORANDUM OF ASSOCIATION (CHAPTER 6)

A Nova Scotia company may not alter its memorandum except as provided for in the NSCA (section 14). Section 19 of the NSCA lists the circumstances when a company may, by special resolution, alter its memorandum. Such alteration must be approved by a court, except where the company wishes to change to a company which has the capacity, rights, powers and privileges of a natural person.

Other Canadian jurisdictions allow alterations of a corporation's articles of incorporation either by special resolution, resolution of shareholders, or resolution of directors, depending on the nature of the amendment. Under the UKCA, a company may alter its memorandum by special resolution, and court approval is only required if minority shareholders make an application to the court for a review. Similarly, in Delaware, New York, and Florida, amendments may be made to a company's Certificate of Incorporation (the equivalent of the memorandum of association) with director and/or shareholder approval.

We have not found any discussion of the historic reasons for which the court's approval is required for alterations to a company's memorandum of association under the NSCA. None of the alterations contemplated under section 19 constitutes a fundamental change to the company such that the interests of shareholders would be endangered. Paragraph 19(1)(i) allows a company to alter the provisions of its memorandum to enable it to amalgamate with any other company or body of persons. This, although it is linked to a fundamental change, is not in itself a fundamental change. Most of the alterations in subsection 19(1) are directly related to business efficiencies of the company. The only change which does not fall into that category is under paragraph 19(1)(j), which allows a company to change to a company which has the capacity, rights, powers and privileges of a natural person; this is also the only change which currently does not require court approval. There seems to be no valid reason why alterations to the memorandum of association require court approval. Because the alterations do not result in fundamental changes to the company, and because they are related to business decisions of the company, requiring the court's approval would seem to contradict the tradition in companies law of leaving the direction of a company to the company itself, where the rights of shareholders and creditors will not be prejudiced. Allowing alterations to the memorandum of association by special resolution should be sufficient to protect the shareholders' interests.

The foregoing comments apply only to subsection 19(1) as it currently reads. If subsection 19(1) is amended to allow an alteration of the memorandum of association to change a company from limited liability to unlimited liability, this particular alteration should require approval by unanimous shareholder resolution, as discussed in Chapter 3.

RECOMMENDATION

For the above reasons, we recommend that subsection 19(4) be amended to read to the following effect:

> (4) An alteration made pursuant to clause (j) [and (k), if the NSCA is amended to allow a company to change from limited to unlimited liability by way of unanimous shareholders' resolution] of subsection (1) shall not take effect until and except insofar as it is approved by all of the members of the company, whether or not the shares held by them otherwise carry the right to vote, and where an alteration is made in this manner the company is subject to subsections (8) to (12) of Section 26.

E. FINANCING SHARE PURCHASES (CHAPTER 7)

The issue examined in Chapter 7 is whether it is appropriate under the NSCA to allow companies to assist in the financing of the purchase of their own shares without the solvency tests currently required by subsection 110(5). This discussion includes a comparison of the Nova Scotia provision with similar provisions in other Canadian jurisdictions and how those jurisdictions have either repealed or amended them, with respect specifically to the solvency tests, and whether approaches taken in other parts of Canada would be useful in Nova Scotia.

This chapter reviews provisions requiring certain disclosure following the granting of financial assistance which is a requirement in Saskatchewan, Alberta, Ontario and British Columbia. It also considers the repeal of such provisions under the CBCA. This chapter contains a recommendation that there be a definition of financial assistance and an express statement that financial assistance may be permitted. We recommend that there not be any statutory restriction on the ability of a company to provide financial assistance.

In order to make it clear that creditors may apply under the provisions of the Third Schedule in this and other areas, the chapter also includes a recommendation to specifically include creditors in the definition of "complainant" in subsection 7(5) of the Third Schedule.

F. CAPITAL OF CONTINUING COMPANIES (CHAPTER 8)

Chapter 8 examines the concerns raised by certain members of the Nova Scotia Bar about the lack of certainty in the NSCA with respect to the share capital of companies continuing into Nova Scotia. We have reviewed how legislation in other jurisdictions in Canada has addressed share capital for continued companies, and recommend that the NSCA be revised to include a provision similar to those found in the CBCA, OBCA and ABCA requiring a company to expressly state what the paid-up capital of a company continuing under Nova Scotia law shall be following continuance.

As noted above, the NSCA embodies the concept of paid-up capital as opposed to stated capital. With this in mind, we recommend that paragraph 133(4)(b) of the NSCA be revised to the following effect:

> (b) For the purposes of this subsection (4) of Section 133, "paid-up capital" shall be the aggregate amount of the consideration for the issue and allotment of shares of each class and series of shares of the company and, for greater certainty, shall include all amounts included as paid-up capital or stated capital in the jurisdiction of the company immediately prior to continuance.

G. AUTHORIZED CAPITAL LIMITS (CHAPTER 9)

Nova Scotia and Prince Edward Island are the only two jurisdictions left in Canada which prescribe that a company's constating documents must set out its maximum authorized capital. In other jurisdictions, companies are permitted to cap authorized capital, but it is not mandatory to do so. This cap on authorized capital is a carry-over from British companies' law, and originally served as a form of protection for investors by preventing dilution of shareholder interests through an increase in authorized capital absent a shareholders' resolution. Until 1983, annual fees payable pursuant to the Nova Scotia Corporations Registration Act were calculated on the basis of the nominal capital of a company. The annual registration fee is now a fixed amount and is no longer based on the nominal capital of a company.

We recommend that legislators in Nova Scotia follow the lead of legislators in other jurisdictions in Canada by eliminating the requirement that companies incorporated under the NSCA specify a limit on their authorized capital. The cap is not in line with other jurisdictions in Canada, an issue that frequently arises when companies continue into Nova Scotia. Further, investors can be more suitably protected by pre-emptive provisions similar to those found in the CBCA.

With this in mind, we recommend that paragraphs 10(a)(iv) to (vi) of the NSCA be revised to the following effect:

> 10 In the case of a company limited by shares,
>
> > (a) the memorandum must state
> >
> > > (iv) for each class and series of shares with or without nominal or par value, the

maximum number of the shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

Further, we recommend the deletion of subsections 20(3) and (4) of the NSCA and the inclusion of a pre-emptive right section similar to section 28 of the CBCA. We recommend this provision be inserted as section 51A and read to the following effect:

> 51A If the articles so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.
>
> (2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued
>
> (a) for consideration other than money;
>
> (b) as a share dividend; or
> (c) pursuant to the exercise of conversion privileges, options or rights previously granted by the company.

Consideration should be given to amending paragraph 134(3)(c) of the NSCA to read to the following effect:

> 134 (3) The amalgamation agreement shall further set out
>
> (c) for each class and series of shares with or without nominal or par value, the maximum number of shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number;

H. SPECIAL RESOLUTIONS AND SHAREHOLDERS' AND DIRECTORS' MEETINGS (CHAPTER 10)

Under the NSCA, a special resolution must be passed by no less than three-quarters of the members present at a general meeting and confirmed at a subsequent meeting by a majority of members present, or it must be in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting. In most other jurisdictions in Canada, a special resolution requires no less than two-thirds of the votes of shareholders in order to pass, and in no other Canadian jurisdiction is the confirmatory meeting required.

It is recommended that the current requirement for three-quarters of the votes of shareholders be reduced to two-thirds, if for no other reason than to reduce the number of inconsistencies between the NSCA and the majority of other Canadian statutes. We further recommend that the requirement for confirmatory meetings be removed from the NSCA, as the protection of shareholders, which is the aim of the confirmatory meetings, is already built in to the definition of special resolutions. This definition requires that notice be given to all shareholders specifying the intention to propose a resolution as a special resolution at a general meeting.

Currently, there is no provision in the NSCA allowing for meetings of shareholders or directors to be held by electronic means. Some Canadian jurisdictions allow electronic meetings; others do not go as far, but they do allow more flexibility than requiring meetings to be held in person (for example, meetings may be held via telephonic or other communication facilities). Most other jurisdictions in Canada have turned their attention to the issue of modernizing their statutes to reflect technological advances. To facilitate meetings of shareholders and directors, who are frequently not present in the same jurisdiction, it would be advisable for the NSCA to be amended to allow for meetings to take place by telephone or by electronic means which allow instantaneous communication. There should also be a provision deeming a shareholder or director who participates in a meeting by such means to have been present at the meeting.

I. DOCUMENTS TO BE AVAILABLE AT THE REGISTERED OFFICE (CHAPTER 11)

Subsections 43(1) and 90(1) of the NSCA require the register of members to be kept at the registered office of the company and to be available for inspection by members of the public. This does not cause a problem with privately held companies, since shares are transferable at the registered office. However, in the case of public companies where the transfer agent is a trust company, the transfer of shares does not normally take place at the registered office, and it has been suggested that allowing the register of members or a copy of the register to be kept elsewhere than at the registered office would facilitate such companies' business practices. The question addressed in Chapter 11 is whether a removal of the restrictions on the location of the register of members is warranted.

Most other jurisdictions in Canada allow flexibility for the location of the share register, so long as the location is controlled by the directors of the company. Most of these jurisdictions, however, restrict the location of the records to within Canada and, in most cases, within the applicable jurisdiction.

Given that there are situations where it would be more convenient and efficient to have the share register of a company held at a location other than the registered office, and given that there is no apparent need to retain the share register at the registered office, it is recommended that the Province consider relaxing the restrictions of location with respect to the register. An amendment should be made to the NSCA allowing the share register to be kept at a location in Canada other than the registered office, where such location is designated by the directors. This will allow greater flexibility for the company while retaining some control over the register. It would also be desirable to require the register and other documents, if located somewhere other than the registered office, to be accessible via computer terminal at the registered office during business hours. This will allow all records of the company to be accessible from the registered office at all times, even if not physically present therein.

J. ACCESS TO THE SHARE REGISTER (CHAPTER 12)

In Nova Scotia, access to the register of members is available to anybody, and anybody may make a copy of the register for a small charge. Refusal to allow access to the register makes the company and any director and manager of the company who knowingly authorized or permitted the refusal liable for a small penalty. If a person wishes to commence a proceeding for a remedy with respect to the refusal of access, that person must first obtain leave in writing of the Attorney General. These requirements are set out in section 43 of the NSCA.

There is no obvious reason why the requirement for the participation of the Attorney General should be retained. It would be preferable to follow the examples set by other jurisdictions, specifically British Columbia, as the procedure in that province is more straightforward, quicker, and presumably less expensive. Such an approach allows a complainant to make an application to the registrar for a compliance order and, where the registrar is unable or unwilling to provide the compliance order, to then have recourse to the court system directly.

We recommend that the NSCA adopt the approach taken in the BCBCA and that subsection 43(5) be repealed and replaced with a provision allowing recourse to the Registrar where there has been a breach of the provisions allowing access to the share register, following in general the approach taken under the BCBCA. We also recommend the addition of a provision allowing an application to the court for a compliance order in a summary manner, as included in the CBCA-type statutes and the BCBCA.

We also recommend that only the Registrar, directors, shareholders and creditors of a company and their personal representatives be permitted to examine the share register, unless the company is a distributing corporation. In the case of a distributing corporation, any person should be entitled to obtain a list setting out the names of the shareholders of the company, the number of shares owned by each and the address of each shareholder or member.

3. THE ROLE OF THE COURT IN AMALGAMATIONS AND FUNDAMENTAL CHANGES OF ULCS

A. INTRODUCTION

Under the NSCA, companies must obtain court approval for amalgamation. This section provides a summary of the law and practice in this area, in Nova Scotia and in certain other jurisdictions, and considers whether the NSCA should be amended to eliminate or restrict the role of the court in approving amalgamations. As many of the amalgamations from recent years have involved Nova Scotia unlimited liability companies ("NSULCs"), we have included a discussion of the court's role with respect to certain fundamental changes of NSULCs.

Until this year, Nova Scotia has been unique among Canadian jurisdictions in allowing the incorporation of ULCs. On May 17, 2005 Alberta proclaimed Bill 16, originally introduced on March 9, 2005 and now Chapter 8 of the Statutes of Alberta 2005. Among the numerous amendments to the ABCA pursuant to Bill 16 was the introduction of an Alberta unlimited liability corporation ("AULC"), although some of the features of the AULC are significantly different from NSULCs.

Among the significant differences are the nature and scope of the liability of shareholders. In the case of an NSULC, the shareholders or members are not directly liable to the creditors, but are liable in the event of a wind-up to contribute an amount sufficient for payment of the company's debts and liabilities. In the case of an AULC, the shareholders will have joint and several liability.

B. NOVA SCOTIA

Section 134 of the NSCA governs the process of amalgamation. For ease of reference, a copy of the section is attached as Appendix "A".

Subsection 134(5) allows amalgamating companies to apply to the Supreme Court for an order approving the amalgamation. Although this language is permissive, subsection 134(10) makes it clear that the Registrar will only certify the amalgamation of the companies upon receipt of the approving order. Thus, the approval of the court is required before the amalgamation will be complete.

Subsection 134(8) sets out the choices available to the court upon hearing an application for amalgamation. The court may either approve the amalgamation agreement as presented or may approve it subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of all parties, including any dissentient shareholders and creditors. There is no express power given to the court to reject an application for amalgamation, although the Supreme Court may do so by virtue of its inherent jurisdiction.

We have found no reported case law specifically discussing the role of the court in amalgamations other than a summary of the procedure given by Oland, J.A. in Re Lipsett Holdings Ltd., 2000 NSCA 112, where she states at paragraph 20:

> Section 134 sets out the procedure to be followed for amalgamations. Amalgamating companies, such as the appellants in this case, initiate the process by entering into an amalgamation agreement and obtaining shareholder approval: s. 134(2) and (4). They then make application to the Supreme Court for court approval: s. 134(5).

Under subsections 134(6) and (7), "unless the court otherwise directs", notice is to be given to any dissenting shareholder and to the creditors. As most amalgamations proceed on the basis of a resolution passed by all the shareholders, the court directs its attention to whether any creditors should be notified and whether the applicant should be required to file the express consent of major creditors.

C. OTHER JURISDICTIONS

FEDERAL

The CBCA addresses amalgamations in sections 181 to 186.1, reproduced in Appendix "B".

Under the CBCA, a corporation proposing to amalgamate must enter into an amalgamation agreement, which must be submitted by the directors of each amalgamating corporation for approval to a meeting of the shareholders of that amalgamating corporation. The amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved the amalgamation by special resolution. Subsection 2(1) of the CBCA defines a special resolution as requiring either at least two-thirds of the votes cast by shareholders who voted in respect of the resolution or the signatures of all shareholders entitled to vote on the resolution.

Section 184 of the CBCA also allows for the amalgamation of related companies by resolution of the directors of each amalgamating corporation, without needing either an amalgamation agreement or a special resolution (vertical and horizontal short-form amalgamations). No such separate procedure is allowed under the NSCA.

Once the amalgamation has been adopted by the shareholders or approved by the directors, where applicable, articles of amalgamation must be sent to the Director appointed pursuant to the CBCA together with a Notice of Registered Office and a Notice of Directors. Subsection 185(2) requires the articles of amalgamation to have attached to them a statutory declaration of a director or officer of each amalgamating corporation establishing to the satisfaction of the Director that the corporation meets a solvency test, and that there are reasonable grounds for believing either that no creditor will be prejudiced by the amalgamation or that adequate notice has been given to all known creditors and no creditor objects otherwise than on grounds that are frivolous or vexatious. On receipt of the articles of amalgamation, the Director must issue a certificate of amalgamation, at which point the amalgamation becomes effective.

Section 186.1 of the CBCA contains a prohibition on amalgamation between a CBCA corporation and one or more bodies corporate pursuant to certain other federal acts without prior authorization of the shareholders by way of special resolution, or unless the corporation is authorized to do so by its directors, where the amalgamating companies are related.

ALBERTA

The ABCA contains provisions allowing amalgamation which reproduce almost verbatim those in the CBCA. They are found at sections 182 to 187. Because most of the sections are identical to those in the CBCA, only section 187 is reproduced in Appendix "C".

Section 187 allows a corporation to amalgamate with an extra-provincial corporation where one corporation is the wholly-owned subsidiary of the other and the extra-provincial corporation is authorized to amalgamate with the Alberta corporation by the laws of the jurisdiction in which it is incorporated. The section does not apply if the corporation is a professional corporation, which is defined in section 1 of the ABCA as a corporation that has the words "professional corporation" as the last words of its name. Where a corporation and an extra-provincial corporation propose to amalgamate, they must enter into an amalgamation agreement. The amalgamation is adopted when the agreement is approved by the directors of the Alberta corporation and by whichever body is required to approve it under the laws of the jurisdiction of incorporation of the extra-provincial corporation, and when the extra-provincial corporation has otherwise complied with the laws of the jurisdiction in which it is incorporated. The companies must then deliver the articles of amalgamation and statutory declaration to the registrar under the ABCA, as described above under the CBCA. The amalgamation becomes effective on the date shown in the certificate of amalgamation issued by the registrar. Alberta is the only jurisdiction to include a provision specifically dealing with an amalgamation with an extra-jurisdictional corporation.

BRITISH COLUMBIA

The BCBCA addresses amalgamations in Division 3 of Part 9 (Company Alterations), reproduced in Appendix "D". The BCBCA approach to amalgamations is a hybrid between the CBCA-type statutes and the companies' law-type statutes. It allows a British Columbia company to amalgamate with one or more other companies, or with one or more foreign corporations (section 269). It requires an amalgamation agreement to be adopted by the shareholders of each amalgamating company, unless the amalgamation is a vertical or horizontal short-form amalgamation (section 270), in which case the amalgamation may be approved by special resolution of the holding company or amalgamating company, respectively, or by a resolution of its directors (sections 273 and 274). Section 275 sets out the formalities of amalgamation. The most interesting aspect of the BCBCA for the purposes of this memorandum is that it allows for amalgamations both with and without court approval.

Section 276 of the BCBCA covers amalgamations with court approval. Such amalgamations must meet the requirements set out in section 275 and, in addition, the applicants must obtain a court order approving the amalgamation, a copy of which must be maintained in the records office of each of the amalgamating companies. Before the court order may be obtained, the amalgamating companies must have adopted the amalgamation agreement (in the case of the amalgamation of unrelated companies) or have obtained the appropriate approval by the shareholders or directors (for vertical and horizontal short-form amalgamations). Notice of the time and place of the hearing of an application must be given to creditors and shareholders.

Section 277 of the BCBCA covers amalgamations without court approval. In order to effect an amalgamation without court approval, amalgamating companies must meet the requirements of section 275 and file in each company's records office an affidavit of a director or officer of each amalgamating company stating that the company has entered into an amalgamation agreement with the other amalgamating companies and that the agreement complies with the requirements under the BCBCA concerning amalgamation agreements and shareholder adoption of amalgamation agreements, or that the company proposes to amalgamate with related companies and that the proposed amalgamation has been approved in accordance with section 273 or 274 (vertical and horizontal short-form amalgamations). The affidavit must also state that the affiant believes and has reasonable grounds for believing that:

1. No creditor of the company will be materially prejudiced by the amalgamation; or

2. The company has complied with the provisions requiring notice to creditors in relation to an amalgamation without court approval, that the only objections in writing received by the company are on grounds that are frivolous or vexatious, are by creditors who did not make an application to the court for an order that the amalgamation not proceed within the prescribed time, or have been dismissed by the court or withdrawn by the creditor.

The affiant must also state that he or she is unaware of any court order or application for a court order that the amalgamation not proceed.

The notice provisions required for amalgamations without court approval are described in section 278 of the BCBCA. They require an amalgamating company to send a written notice to its creditors regarding the proposed amalgamation, and to publish the notice in a newspaper distributed generally in the place where the company has its registered office. Subsection 278(3) allows a creditor to file a notice of objection, to which the company must respond if it intends to proceed with the amalgamation. The amalgamating company may make application to the court for an order dismissing the objection of the creditor or for an order approving the amalgamation.

Under section 279 of the BCBCA, an amalgamation is effective on the date and time that the amalgamation application is filed with the registrar, or at a later date, where that later date has been specified in the amalgamation application or court order.

OTHER PROVINCES

The MCA, the NBBCA, the NLCA, the OBCA, and the SBCA follow almost exactly the amalgamation process as set out in the CBCA and, therefore, their relevant provisions have not been attached separately.

The PEICA follows a letters patent system, under which companies may amalgamate by entering into an amalgamation agreement which is subsequently approved by three-quarters of the shareholders of each amalgamating company at a general meeting. The approved agreement is then sent to the director under the PEICA with an application for the letters patent confirming the agreement and amalgamating the companies. Because of Prince Edward Island's unique status as a letters patent jurisdiction, we have not reviewed its amalgamation procedure in detail.

D. DISCUSSION

Traditionally, the rationale for requiring court approval for amalgamations was the protection of shareholders and creditors. Over the course of years of amendments to the statutes in other jurisdictions, supplementary provisions were added which, it was argued, would allow sufficient protection in and of themselves. These provisions included a shareholder's right to dissent and the oppression remedy, both of which also appear in the Third Schedule to the NSCA (sections 2 and 5).

The issue of shareholder and creditor protection was addressed some years ago in Alberta prior to the implementation of certain amendments to the ABCA, when there was quite a bit of discussion surrounding the reasons for making the proposed changes. Some of this discussion focussed on the requirement for a court order approving an application for amalgamation. It was argued that the court order system was no longer required because shareholders would be protected by having the right to dissent to the amalgamation and to be bought out under what was eventually to become section 191 of the revised ABCA. Dissenting shareholders would also have recourse against the corporation under the oppression remedy. Creditors, on the other hand, would be protected by the requirement for a statutory declaration under what would become subsection 185(2) of the revised ABCA. This statutory declaration requires a proposed director of the amalgamated corporation to establish to the registrar's satisfaction that the amalgamated corporation will meet a solvency test and that either no creditors will be prejudiced by the amalgamation, or adequate notice of the proposed amalgamation has been given to creditors.[1]

Discussions with John Lundell[2], Chairman of the Legal Advisory Committee which advised the British Columbia Minister of Finance on the recently enacted BCBCA, revealed that, in British Columbia, the reasoning behind retaining a hybrid system with respect to amalgamations was twofold. First, having the option of obtaining a court order approving an amalgamation allows greater flexibility in circumstances where it is not possible for a director to swear the affidavit required under section 277. This applies equally in Nova Scotia, where it is possible to envision a situation where companies would not meet the solvency/creditor prejudice test, and yet there are valid reasons for allowing the amalgamation. Second, where a company obtains a court order approving an amalgamation, it may benefit from a registration exemption under the United States Securities Act of 1933, the relevant provisions of which read as follows:

> Section 3 – Classes of Securities under this Title
>
> a. Exempted securities
>
> Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:
>
> [...]
>
> 10. Except with respect to a security exchanged in a case under title 11 of the United States Code, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or

---

[1] Proposals for a New Alberta Business Corporations Act, Volume 2 (Edmonton: University of Alberta Law Research and Reform Institute, 1980) at 244.

[2] John O.E. Lundell, Q.C. – Associate Counsel, Lawson Lundell LLP, Vancouver, British Columbia.

> agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;
>
> [Emphasis added.]

The wording of the Securities Act of 1933 is arguably broad enough to encompass a court ordered amalgamation under the NSCA, as it would be with respect to court ordered amalgamations under the BCBCA. Thus, it seems both reasons for retaining a hybrid system in British Columbia would apply equally in Nova Scotia.

The Nova Scotia practitioners who responded to the letter from the Service Nova Scotia & Municipal Relations Liaison Committee[3] were all in favour of adopting a hybrid system. They stated that routine amalgamations where shareholders, creditors or other third party interests are not negatively affected should not require a court appearance, but that the court should continue to have a role where an amalgamation is more complex, or where it may not be possible to meet specified requirements, and where the policy issues addressed by those requirements are inapplicable for one reason or another. Concern was expressed regarding a complete repeal of the provisions for court approval, as there would inevitably be situations where an amalgamation would be desirable and beneficial for the companies involved and for their shareholders, but if the companies had to rely solely upon a solvency test they would be unable to amalgamate. Although these practitioners expressed some degree of satisfaction with the court approval process as it exists, they all clearly indicated that relying solely on a court approval process is inappropriate, and suggestions were made for refining the current procedure. The following specific concerns were raised with respect to the current court approval process:

1. It results in some necessary delays, which cannot be improved without a removal of the court approval requirements or complex tinkering with court processes. As a result, combinations of procedures cannot happen in a straightforward manner as they do in other jurisdictions (for example, back-to-back amalgamations on the same day, or a continuance and an amalgamation on the same day).

2. Different members of the court have different concerns, and it is not always possible to anticipate which judge will require certain issues to be addressed in a specific manner. This is especially difficult in areas where judges' preferences are contradictory.

3. The court approval procedure is costly, requiring physical attendance at court and the preparation of more complex documents and submissions than would be necessary in other jurisdictions.

---

[3] As discussed in the introduction.

In summary, the Nova Scotia practitioners who responded suggested the current procedure be retained, but supplementing it with an alternative procedure similar to that available in other jurisdictions whereby a statement, sworn or otherwise, may be filed with the Registrar so long as it meets specific criteria with respect to solvency, appropriate approvals and notices to creditors, and the amalgamation may take place without the companies' having to make a court application.

The amalgamation process under the NSCA is used primarily by two groups: Nova Scotia companies with local shareholders, who are amalgamating for various corporate reasons and have no choice but to use the amalgamation procedure under the NSCA; and Nova Scotia companies owned by extra-jurisdictional shareholders, who are creating ULCs for tax purposes. For Nova Scotia companies with local shareholders, it is possible to continue to be governed by the act of another jurisdiction such as the CBCA. Except for companies which are incorporated as NSULCs, the most common method of creating a ULC historically has been to make use of the amalgamation provisions of the NSCA. More recently, the provisions for a plan of arrangement contained in the NSCA have also been used. However, either method is somewhat cumbersome and companies may choose to seek to utilize the provisions of another jurisdiction such as the recently passed provisions of the ABCA.

As outlined above in the summary of lawyers' responses, there are a few advantages and disadvantages of a system requiring court approval. The advantages include the protection of persons who may be prejudiced by the amalgamation. Other jurisdictions cover this issue with solvency tests and statutory declarations to the effect that the amalgamation will not prejudice creditors or that creditors have been notified, and that shareholder approval has been obtained. Advantages also include flexibility, where the court may approve amalgamations which do not meet the strict requirements of the statutory declarations. Disadvantages include the amount of time required to complete an amalgamation; the difficulties associated with more complex reorganizations and financings where such timing is critical; the cost of amalgamations, especially once the cost of incorporating a ULC is taken into account; and the lack of consistent rules for granting applications for orders approving amalgamations.

E. UNLIMITED LIABILITY COMPANIES

The creation of NSULCs has been widespread among national and international firms wishing to organize their finances in the most tax efficient manner. The existing provision in the US tax system which confers special tax status on ULCs has resulted in significant work for Nova Scotia lawyers and significant fees for the provincial government.

Alberta's Bill 16, proclaimed in force May 17, 2005, introduces a much simpler procedure applicable to companies wanting to change to a ULC. It is of course too early to speculate as to whether this will mean that most companies will now choose Alberta for the incorporation or conversion to a ULC, especially when the AULC has characteristics which are considerably different than those existing in Nova Scotia.

There has also been discussion in Ontario about possible amendments to the OBCA to permit unlimited liability corporations. On May 16, 2005, the Honourable Jim Watson, Ontario Minister of Consumer and Business Services, indicated that the Ontario government plans to reform commercial and corporate law in three phases. In phase two, there will be a comprehensive review of the OBCA and the government will be examining a number of issues, including unlimited liability corporations.[4]

Alberta's Bill 16 allows an extra-jurisdictional limited corporation to continue into Alberta as an unlimited liability corporation (paragraph 15.5(1)(c)). A provincial limited corporation will be able to amend its articles to convert to an unlimited liability corporation (subsection 15.6(3)). Furthermore, Bill 16 amends section 173(1) of the ABCA to allow this amendment to the articles to take place by special resolution. No court intervention will be required in order to convert a limited corporation to an unlimited corporation. For ease of reference, the relevant sections of Alberta's Bill 16 are attached as Appendix "E".

Under the UKCA, a limited liability company may change to a ULC by application to the Registrar of Companies, in the prescribed form, signed by a director or secretary of the company, together with: the prescribed form of assent to the company being registered as unlimited, subscribed to by all the members of the company; a statutory declaration of the directors of the company that the persons subscribing to the form of assent constitute the whole membership of the company, and that if any of the members have not subscribed, the directors have taken all reasonable steps to satisfy themselves that each person who subscribed on behalf of a member was lawfully empowered to do so; a printed copy of the memorandum incorporating the alterations in it set out in the application; and if articles have been registered, a printed copy of them incorporating the alterations set out in the application (section 49). For ease of reference, the relevant sections of the UKCA are attached as Appendix "F".

A ULC may of course be incorporated under the NSCA. More frequently, limited liability companies incorporated under the laws of another jurisdiction are continued into Nova Scotia with the intention of converting to a company with unlimited liability. An amalgamation procedure has been used for this purpose in the vast majority of cases. Under this process, an extra-jurisdictional company is continued into Nova Scotia as a Nova Scotia limited company, a shell Nova Scotia limited company is incorporated and the continued company and the shell company amalgamate and elect upon amalgamation to form a ULC. This process is time consuming, cumbersome, expensive, and it creates or may create problems with respect to taxes and the fiscal year end of the amalgamated companies. Costs include the current charge of $6,000.00 payable on the incorporation and registration of a ULC, which does not include any legal fees, and is paid directly to the Registrar. It is foreseeable that in other jurisdictions, once new legislation is introduced, the creation of a ULC will be much simpler, and may only be a matter of obtaining a special resolution or a unanimous shareholders' resolution, possibly with the requirement of the consent of creditors.[5] It is also likely that the processing fees will be cheaper.

---

[4] Remarks by the Honourable Jim Watson, MPP, Minister of Consumer and Business Services (Ontario) entitled "Reforming Ontario's Business Laws", presented to a meeting of the Ontario Bar Association on May 16, 2005.

The other process for forming a ULC from a limited liability company is relatively new in Nova Scotia, and involves a plan of arrangement under section 130 of the NSCA. In a recent decision of the Supreme Court of Nova Scotia, Moir J. approved the use of a plan of arrangement as a method of amending a company's memorandum of association to convert a limited liability company into a ULC (see Re EL Management Incorporated, 2004 NSSC 169 errl). The use of the plan of arrangement allows a company wishing to become a ULC to avoid the creation of a new company and the resulting new year-end with its implications for taxes and licences. Following the reasoning of this decision, where a solvent limited company wishes to convert to a ULC, it may apply to the court for an order summoning a meeting of creditors or members to consider the proposed plan of arrangement. Once the creditors or members agree on the plan of arrangement, the company must then return to court to receive approval of the agreement, at which point the plan of arrangement becomes binding on the creditors, members and the company. After a close reading of the statute and the case law, Moir J. concluded that section 30 "allows for plans of arrangements that alter the liability of members as provided in the Memorandum of Association" (at paragraph 13).

Although the use of the plan of arrangement to create a ULC does avoid some of the difficulties associated with the amalgamation procedure (for example, the creation of a new shell company with the associated tax implications), it is still not a straightforward process, and requires two court appearances and a certain amount of time in order to complete all the required steps. On the other hand, the fee payable at the time of incorporation of a ULC is not required when the ULC is created pursuant to a plan of arrangement. In fact, if the company is in good standing at the time the plan of arrangement is entered into, the fees required are minimal. The plan of arrangement is more acceptable in some cases than the traditional amalgamation procedure, but it is still not straightforward.

One of the main concerns expressed by members of the Nova Scotia bar with respect to ULCs is that our process is unnecessarily complex, and as a result of pending legislation in other jurisdictions, we may be at risk of losing our current status as a jurisdiction of choice for ULCs. At the moment, the main attraction for international and major national companies to Nova Scotia is the ability to incorporate a ULC.

---

[5] Nova Scotia courts currently require that notice be given to secured creditors and significant unsecured creditors of amalgamating companies, to obtain their consent to the amalgamation. It is questionable why this consent is necessary, as the interests of creditors can only be enhanced when the liability of a company changes from limited to unlimited.

If Nova Scotia is to retain a significant number of ULCs, it must be prepared to introduce amendments to the legislation to make it consistent with what companies in other jurisdictions will need, and it must be able to react to legislative changes in other jurisdictions. This will require a streamlining of the creation and incorporation procedures for ULCs, which could take place in several ways. For example, the procedure for amalgamation could and probably should be simplified, as discussed above, and a hybrid system introduced; alternatively, the NSCA could allow a limited company to simply alter its memorandum of association, by unanimous resolution of the shareholders, to change its liability from limited to unlimited.

No matter which alternative is chosen to simplify the process of creating a ULC, the conversion of a company should be authorized by unanimous resolution of the shareholders unless the court otherwise directs. Anything less (i.e. a special resolution) would not afford enough protection for potential dissenting shareholders. Amalgamation by special resolution is sufficient for companies which are not changing their liability, as dissenting shareholders may have recourse under the oppression remedy contained in the Third Schedule. However, unlimited liability is effective immediately upon becoming a shareholder, and this liability continues for one year after a person ceases to be a shareholder (paragraph 135(a)). Thus, an application for relief under the oppression remedy would come too late to protect a dissenting shareholder from the potential harm which an exposure to unlimited liability would incur. Bearing that in mind, either of the suggestions given above would allow a company to become a ULC without requiring court approval, thus simplifying and accelerating the process and making it more competitive with what we expect the law will shortly be in certain other jurisdictions.

A further alternative would be for Nova Scotia to introduce a simplified, modern procedure for the creation of a ULC by election on continuance, or by alteration of the company's memorandum of association through a shareholders' resolution (although we would suggest, again, that it be by unanimous rather than special resolution). Nova Scotia could also amend sections 68 and 69 of the NSCA, which allow for the re-registration of a ULC as a limited company to also allow for the re-registration of a limited company as a ULC.

F. RECOMMENDATIONS

Given the uses to which the amalgamation procedure is currently put, and the importance voiced by members of the Nova Scotia Bar of ensuring that reorganizations be permitted as simply and efficiently as possible, so long as the rights of creditors, shareholders and others remain protected, we make the following recommendations:

1. The current amalgamation procedure should be retained, as it allows for flexibility;

2. The current amalgamation procedure should also be supplemented by a second, alternative procedure, which mirrors that found in CBCA-type statutes and allows for amalgamation

   (a) upon approval of the amalgamation by a special resolution of the shareholders of each company where the amalgamating companies are unrelated, or by a directors' resolution where the companies are related, and

   (b) upon the filing of an amalgamation agreement to which are attached the memorandum and articles of association of the (proposed) amalgamated company as well as a statutory declaration of an officer or director of each company indicating that the company will be able to meet a solvency test on amalgamation and that creditors either will not be prejudiced by the amalgamation or have been notified of the proposed amalgamation and have not objected;

3. The current method of creation of a ULC should be simplified to allow

   (a) an existing Nova Scotia limited company to convert to a ULC by altering its memorandum of association through a unanimous resolution of the shareholders;

   (b) an extra-jurisdictional company to elect to become a ULC upon continuance; or

   (c) an existing Nova Scotia limited company to re-register as a ULC; and

4. The Province should reconsider the amount which should be charged for the incorporation of a ULC (currently $6,000.00), especially if it becomes apparent that a ULC may be incorporated in other jurisdictions at a lower cost. It should also reconsider the amount of the registration fee or tax (currently $2,000.00).

Appendix "A"

Nova Scotia Companies Act ("NSCA")
Sections 134, 68 and 69

134 (1) Any two or more companies, including holding and subsidiary companies, may amalgamate and continue as one company.

Amalgamation agreements

(2) The companies proposing to amalgamate may enter into an amalgamation agreement, which shall prescribe the terms and conditions of the amalgamation and the mode of carrying the amalgamation into effect.

Statements to be in agreements

(3) The amalgamation agreement shall further set out

(a) the name of the amalgamated company;

(b) the place within the Province at which the registered office of the amalgamated company is to be situated;

(c) the amount of the authorized capital of the amalgamated company and the division thereof into shares;

(d) the restrictions, if any, on the objects and powers of the amalgamated company;

(e) the names, occupations and places of residence of the first directors of the amalgamated company;

(f) the date when subsequent directors are to be elected;

(g) the manner of converting the authorized and issued capital of each of the companies into that of the amalgamated company; and

(h) such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company.

Adoption of agreement

(4) The amalgamation agreement shall be submitted to the shareholders of each of the amalgamating companies at general meetings thereof called for the purpose of considering the agreement, and if three fourths of the votes cast at each meeting are in favour of the amalgamation agreement,

(a) the secretary of each of the amalgamating companies shall certify that fact under the corporate seal thereof; and

(b) the amalgamation agreement shall be deemed to have been adopted by each of the amalgamating companies.

Approval orders

(5) Where the amalgamation agreement is deemed to have been adopted, the amalgamating companies may apply to the court for an order approving the amalgamation.

Notice of application

(6) Unless the court otherwise directs, each amalgamating company shall notify each of its dissentient shareholders, in such manner as the court may direct, of the time and place when the application for the approving order will be made.

Manner of notice to creditors

(7) Unless the court otherwise directs, notice of the time and place of the application for the approving order shall be given to the creditors of an amalgamating company in such manner as the court may direct.

Terms and conditions

(8) Upon the application, the court shall hear and determine the matter and may approve the amalgamation agreement as presented or may approve it subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of all parties including the dissentient shareholders and creditors.

Filing of agreement

(9) The amalgamation agreement and the approving order shall be filed with the Registrar, together with proof of compliance with any terms and conditions that may have been imposed by the court in the approving order.

Certificate of amalgamation

(10) On receipt of the amalgamation agreement, the approving order and such other documents as may be required pursuant to subsection (9), the Registrar shall issue a certificate of amalgamation under his seal of office and certifying that the amalgamating companies have amalgamated.

Name, capital and restrictions

(11) On and from the date of the certificate of amalgamation, the amalgamating companies are amalgamated and are continued as one company, hereinafter called the "amalgamated company", under the name and having the authorized capital and restrictions, if any, on its objects and powers specified in the amalgamation agreement.

Powers, rights and liabilities

(12) The amalgamated company thereafter possesses all the property, rights, privileges and franchises, and is subject to all the liabilities, contracts and debts of each of the amalgamating companies, and all the provisions of the amalgamation agreement respecting the name of the amalgamated company, its registered office, capital and restrictions, if any, on its objects and powers, shall be deemed to constitute the memorandum of association of the amalgamated company.

Amalgamation deemed incorporation

(13) A company amalgamated on or after the first day of September, 1982, shall for the purposes of subsection (3) of Section 19 and subsections (7) to (12) of Section 26 be deemed to be a company incorporated on or after that date.

Articles of association

(14) Where the amalgamation agreement does not provide for the adoption of the articles of one of the amalgamating companies or for the adoption of new articles as articles of association for the amalgamated company, the shareholders of the amalgamated company at a general meeting thereof called for the purpose may, if approved by three fourths of the votes cast thereat, adopt and agree upon articles of association for the amalgamated company.

Registration of new articles

(15) Where new articles of association are adopted for the amalgamated company, the articles may be filed with the Registrar at the same time as the amalgamation agreement or subsequently if the articles are certified

(a) by each secretary of each amalgamating company, where the articles were adopted and agreed upon as a provision of the amalgamation agreement; or

(b) by the secretary of the amalgamated company, where the articles were adopted and agreed upon by the shareholders of the amalgamated company.

In lieu of adopted articles

(16) Where articles of an amalgamated company are not adopted by the amalgamation agreement as the articles of the amalgamated company, and new articles are not filed with the Registrar pursuant to subsection (15), the articles contained in Table A in the First Schedule to this Act apply as the articles of the amalgamated company.

Application of First Schedule

(17) Notwithstanding that articles have been adopted by the amalgamation agreement or filed as articles of the amalgamated company, the articles contained in Table A in the First Schedule to this Act, in so far as the articles of the amalgamated company do not exclude or modify, apply in the same manner and to the same extent as if these articles were contained in the articles adopted and agreed upon for the amalgamated company.

Deemed holding companies

(18) For the purpose of this Section, a company shall be deemed to be another's holding company if, but only if, that other is its subsidiary.

Deemed subsidiary companies

(19) For the purpose of this Section, a company shall be deemed to be a subsidiary of another company if, but only if

(a) it is controlled by

(i) that other,

(ii) that other and one or more companies each of which is controlled by that other, or

(iii) two or more companies each of which is controlled by that other; or

(b) it is a subsidiary of a company that is that others subsidiary.

Application of Section

(20) This Section shall apply to any company that is incorporated by or under the authority of an Act of the Legislature.

Amalgamation deemed incorporation

(21) An amalgamated company shall, for the purposes of the other provisions of this Act, be deemed to be a company incorporated under this Act within the meaning of clause (c) of Section 2 so far as the nature of an amalgamated company will permit.

Application of Section 16

(22) The provisions of Section 16 shall apply to all companies proposing to amalgamate. R.S., c. 81, s. 134.

Effect of registration and procedure

68 (1) Subject to this Section, any company registered as unlimited may register under this Act as limited, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of the company before the registration.

(2) On registration in pursuance of this Section the Registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act. R.S., c. 81, s. 68.

Powers of company

69 An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following, namely:

(a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purpose of the company being wound up;

(b) provide that a special portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up. R.S., c. 81, s. 69.

Appendix "B"

Canada Business Corporations Act ("CBCA")
Sections 182-186.1

181. Two or more corporations, including holding and subsidiary corporations, may amalgamate and continue as one corporation.

182. (1) Each corporation proposing to amalgamate shall enter into an agreement setting out the terms and means of effecting the amalgamation and, in particular, setting out

> (a) the provisions that are required to be included in articles of incorporation under section 6;
>
> (b) the name and address of each proposed director of the amalgamated corporation;
>
> (c) the manner in which the shares of each amalgamating corporation are to be converted into shares or other securities of the amalgamated corporation;
>
> (d) if any shares of an amalgamating corporation are not to be converted into securities of the amalgamated corporation, the amount of money or securities of any body corporate that the holders of such shares are to receive in addition to or instead of securities of the amalgamated corporation;
>
> (e) the manner of payment of money instead of the issue of fractional shares of the amalgamated corporation or of any other body corporate the securities of which are to be received in the amalgamation;
>
> (f) whether the by-laws of the amalgamated corporation are to be those of one of the amalgamating corporations and, if not, a copy of the proposed by-laws; and
>
> (g) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated corporation.

Cancellation

(2) If shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations, the amalgamation agreement shall provide for the cancellation of such shares when the amalgamation becomes effective without any repayment of capital in respect thereof, and no provision shall be made in the agreement for the conversion of such shares into shares of the amalgamated corporation.

Shareholder approval

183. (1) The directors of each amalgamating corporation shall submit the amalgamation agreement for approval to a meeting of the holders of shares of the amalgamating corporation of which they are directors and, subject to subsection (4), to the holders of each class or series of such shares.

Notice of meeting

(2) A notice of a meeting of shareholders complying with section 135 shall be sent in accordance with that section to each shareholder of each amalgamating corporation, and shall

(a) include or be accompanied by a copy or summary of the amalgamation agreement; and
(b) state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate an amalgamation.

Right to vote

(3) Each share of an amalgamating corporation carries the right to vote in respect of an amalgamation agreement whether or not it otherwise carries the right to vote.

Class vote

(4) The holders of shares of a class or series of shares of each amalgamating corporation are entitled to vote separately as a class or series in respect of an amalgamation agreement if the amalgamation agreement contains a provision that, if contained in a proposed amendment to the articles, would entitle such holders to vote as a class or series under section 176.

Shareholder approval

(5) Subject to subsection (4), an amalgamation agreement is adopted when the shareholders of each amalgamating corporation have approved of the amalgamation by special resolutions.

Termination

(6) An amalgamation agreement may provide that at any time before the issue of a certificate of amalgamation the agreement may be terminated by the directors of an amalgamating corporation, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating corporations.

Vertical short-form amalgamation

184. (1) A holding corporation and one or more of its subsidiary corporations may amalgamate and continue as one corporation without complying with sections 182 and 183 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation;

(a.1) all of the issued shares of each amalgamating subsidiary corporation are held by one or more of the other amalgamating corporations; and

(b) the resolutions provide that

(i) the shares of each amalgamating subsidiary corporation shall be cancelled without any repayment of capital in respect thereof,

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating holding corporation, and

(iii) no securities shall be issued by the amalgamated corporation in connection with the amalgamation and the stated capital of the amalgamated corporation shall be the same as the stated capital of the amalgamating holding corporation.

Horizontal short-form amalgamation

(2) Two or more wholly-owned subsidiary corporations of the same holding body corporate may amalgamate and continue as one corporation without complying with sections 182 and 183 if

(a) the amalgamation is approved by a resolution of the directors of each amalgamating corporation; and

(b) the resolutions provide that

(i) the shares of all but one of the amalgamating subsidiary corporations shall be cancelled without any repayment of capital in respect thereof;

(ii) except as may be prescribed, the articles of amalgamation shall be the same as the articles of the amalgamating subsidiary corporation whose shares are not cancelled, and

(iii) the stated capital of the amalgamating subsidiary corporations whose shares are cancelled shall be added to the stated capital of the amalgamating subsidiary corporation whose shares are not cancelled.

Sending of articles

185. (1) Subject to subsection 183(6), after an amalgamation has been adopted under section 183 or approved under section 184, articles of amalgamation in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 106.

Attached declarations

(2) The articles of amalgamation shall have attached thereto a statutory declaration of a director or an officer of each amalgamating corporation that establishes to the satisfaction of the Director that

(a) there are reasonable grounds for believing that

(i) each amalgamating corporation is and the amalgamated corporation will be able to pay its liabilities as they become due, and

(ii) the realizable value of the amalgamated corporation's assets will not be less than the aggregate of its liabilities and stated capital of all classes; and

(b) there are reasonable grounds for believing that

(i) no creditor will be prejudiced by the amalgamation, or

(ii) adequate notice has been given to all known creditors of the amalgamating corporations and no creditor objects to the amalgamation otherwise than on grounds that are frivolous or vexatious.

Adequate notice

(3) For the purposes of subsection (2), adequate notice is given if

(a) a notice in writing is sent to each known creditor having a claim against the corporation that exceeds one thousand dollars;

(b) a notice is published once in a newspaper published or distributed in the place where the corporation has its registered office and reasonable notice thereof is given in each province where the corporation carries on business; and

(c) each notice states that the corporation intends to amalgamate with one or more specified corporations in accordance with this Act and that a creditor of the corporation may object to the amalgamation within thirty days from the date of the notice.

Certificate of amalgamation

(4) On receipt of articles of amalgamation, the Director shall issue a certificate of amalgamation in accordance with section 262.

Effect of certificate

186. On the date shown in a certificate of amalgamation

(a) the amalgamation of the amalgamating corporations and their continuance as one corporation become effective;

(b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;

(c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;

(d) an existing cause of action, claim or liability to prosecution is unaffected;

(e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;

(f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and

(g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

Amalgamation under other federal Acts

186.1 (1) Subject to subsection (2), a corporation may not amalgamate with one or more bodies corporate pursuant to the Bank Act, the Canada Cooperatives Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act unless the corporation is first authorized to do so by the shareholders in accordance with section 183.

Short-form amalgamations

(2) A corporation may not amalgamate with one or more bodies corporate pursuant to the provisions of one of the Acts referred to in subsection (1) respecting short-form amalgamations unless the corporation is first authorized to do so by the directors in accordance with section 184.

Discontinuance

(3) On receipt of a notice satisfactory to the Director that a corporation has amalgamated pursuant to one of the Acts referred to in subsection (1), the Director shall file the notice and issue a certificate of discontinuance in accordance with section 262.

Notice deemed to be articles

(4) For the purposes of section 262, a notice referred to in subsection (3) is deemed to be articles that are in the form that the Director fixes.

Act ceases to apply

(5) This Act ceases to apply to the corporation on the date shown in the certificate of discontinuance.

Non-application

(6) For greater certainty, section 185 does not apply to a corporation that amalgamates pursuant to one of the Acts referred to in subsection (1).

Appendix "C"

Alberta Business Corporations Act ("ABCA") Section 187

187 (1) A corporation may amalgamate with an extra-provincial corporation and continue as one corporation under this Act if

(a) the extra-provincial corporation is authorized to amalgamate with the corporation by the laws of the jurisdiction in which the extra-provincial corporation is incorporated, and

(b) one is the wholly-owned subsidiary of the other.

(2) Subsection (1) does not apply if the corporation is a professional corporation.

(3) A corporation and an extra-provincial corporation proposing to amalgamate shall enter into an amalgamation agreement setting out the terms and means of effecting the amalgamation and, in particular,

(a) providing for the matters enumerated in section 182(1)(a), (b) and (g),

(b) providing that the shares of the wholly-owned subsidiary shall be cancelled without any repayment of capital in respect of those shares, and

(c) providing that no securities shall be issued by the amalgamated corporation in connection with the amalgamation.

(4) An amalgamation under this section is adopted when

(a) the agreement is approved by the directors of the corporation,

(b) the agreement is approved by the directors or comparable governing body of, or the members of, the extra-provincial corporation, whichever body is required under the laws of the jurisdiction or incorporation of the extra-provincial corporation to approve it, and

(c) the extra-provincial corporation has otherwise complied with the law of the jurisdiction in which it is incorporated.

(5) An amalgamation agreement under this section may provide that at any time before the issue of a certificate of amalgamation, the agreement may be terminated by the directors of the corporation or the directors or comparable governing body of the extra-provincial corporation, notwithstanding any previous approval of the agreement.

(6) Sections 185 and 186 apply to an amalgamation under this section as if both of the amalgamating bodies corporate were corporations except that the notice referred to in section 185(3)(b) shall also be published or distributed in each jurisdiction outside Canada where either body corporate carries on business.

Appendix "D"

British Columbia Business Corporations Act ("BCBCA")
Sections 269-282

Amalgamation permitted

269 The following corporations may amalgamate and continue as one company:

(a) a company with one or more other companies;

(b) one or more companies with one or more foreign corporations.

Amalgamation agreements

270 (1) In order for a company to amalgamate with one or more other corporations under section 269 (a) or (b), it must, unless the proposed amalgamation is to be effected under section 273 or 274,

(a) enter into an amalgamation agreement with the other amalgamating corporations, and

(b) have the amalgamation agreement adopted by the company's shareholders under section 271.

(2) An amalgamation agreement referred to in subsection (1) of this section must set out the terms and conditions of the amalgamation and must, in particular,

(a) set out the full name of each of the individuals who are to be the directors of the amalgamated company, and the prescribed address for each of those individuals,

(b) set out the manner in which the issued shares of each amalgamating corporation will be exchanged for one or more of the following:

(i) securities of the amalgamated company;

(ii) securities of any other corporation;

(iii) money,

(c) set out any other details necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamated company, and

(d) have attached to it

(i) a copy of the articles that the amalgamated company will have after the amalgamation, which articles must comply with section 12 (1) and (2) and be signed by one or more of the individuals referred to in paragraph (a) of this subsection, and

(ii) a copy of the amalgamation application to be filed with the registrar under section 275 (1) (a).

(3) Despite subsection (2) of this section, if shares of one of the amalgamating corporations are held by or on behalf of another of the amalgamating corporations,

(a) the amalgamation agreement must provide for the cancellation of those shares at the time that the amalgamation takes effect, without any repayment of capital in respect of those shares, and

(b) no provision may be made in the agreement for the exchange of those shares for securities of the amalgamated company or of any other corporation, or for money.

Shareholder adoption of amalgamation agreements

271 (1) An amalgamation agreement is adopted by the shareholders of an amalgamating company if

(a) all of the shareholders, whether or not their shares otherwise carry the right to vote, adopt the amalgamation agreement by a unanimous resolution, or

(b) the amalgamation agreement is adopted by the shareholders in accordance with subsection (6).

(2) If the amalgamation agreement is to be submitted for adoption at a meeting under subsection (6), the amalgamating company must send a notice of the meeting to each shareholder of the amalgamating company at least the prescribed number of days before the date of the proposed meeting.

(3) A notice of meeting sent under subsection (2) must be accompanied by

(a) a copy of the amalgamation agreement,

(b) a summary of the amalgamation agreement in sufficient detail to permit the shareholders to form a reasoned judgment concerning the matter, or

(c) a notification that each shareholder may, on request, obtain a copy of the amalgamation agreement before the meeting.

(4) A company that has included in a notice of meeting referred to in subsection (3) a notification referred to in subsection (3) (c) must, unless the court orders otherwise, send, promptly and without charge, a copy of the amalgamation agreement to each shareholder who requests a copy.

(5) Section 50 applies if a person does not receive the copy of the amalgamation agreement to which the person is entitled.

(6) An amalgamation agreement is adopted by the shareholders of an amalgamating company for the purposes of subsection (1) (b) of this section when

(a) the shareholders approve adoption of the amalgamation agreement

(i) by a special resolution, or

(ii) if any of the shares held by the shareholders who under subsection (7) are entitled to vote on the resolution to approve the adoption do not otherwise carry the right to vote, by a resolution of the company's shareholders passed by at least a special majority of the votes cast by the company's shareholders, and

(b) the shareholders holding shares of each class or series of shares to which are attached rights or special rights or restrictions that would be prejudiced or interfered with by the adoption of the amalgamation agreement approve adoption of the amalgamation agreement by a special separate resolution of those shareholders.

(7) Each share of an amalgamating company carries the right to vote in respect of a resolution referred to in subsection (6) (a) whether or not that share otherwise carries the right to vote.

(8) Section 61 does not apply to an amalgamation under this Division.

Shareholders may dissent

272 Any shareholder of an amalgamating company may send a notice of dissent, under Division 2 of Part 8, in respect of a resolution under 271 (6) to adopt an amalgamation agreement, to the amalgamating company of which the person is a shareholder or, if the amalgamation has taken effect, to the amalgamated company.

Vertical short form amalgamations

273 (1) A holding corporation that is a company and one or more of its subsidiary corporations may amalgamate and continue as one company without complying with sections 270 and 271 if

(a) the holding corporation, if a pre-existing company, has complied with section 370 (1) or 436 (1),

(b) all of the issued shares of each amalgamating subsidiary corporation are held by one or more of the other amalgamating corporations,

(c) the amalgamation is approved by a special resolution of the holding corporation or by a resolution of its directors, and

(d) the resolution requires that

(i) the shares of each amalgamating subsidiary corporation be cancelled on the amalgamation without any repayment of capital in respect of those shares,

(ii) the amalgamated company have, as its notice of articles and articles, the notice of articles and articles of the holding corporation, and

(iii) the amalgamated company refrain from issuing any securities in connection with the amalgamation.

(2) On an amalgamation under this section, the capital of the amalgamated company is the same as the capital of the amalgamating holding corporation.

Horizontal short form amalgamations

274 (1) Two or more companies that are subsidiaries of the same holding corporation may amalgamate and continue as one company without complying with sections 270 and 271 if

(a) all of the issued shares of each amalgamating company are held by the holding corporation or another amalgamating company,

(b) the amalgamation is approved by each of the amalgamating companies by a special resolution of the amalgamating company or by a resolution of its directors,

(c) the resolutions require that

(i) subject to subsection (2), the shares of all but one of the amalgamating companies be cancelled on the amalgamation without any repayment of capital in respect of those shares, and

(ii) the amalgamated company have, as its notice of articles and articles, the notice of articles and articles of the amalgamating company whose shares are not to be cancelled, and

(d) the amalgamating company the shares of which are not to be cancelled under paragraph (c) (i) of this subsection, if a pre-existing company, has complied with section 370 (1) or 436 (1).

(2) The amalgamating company, the shares of which are not to be cancelled under subsection (1) (c) (i) of this section (the "primary company") must be a company the shares of which are held by the holding corporation.

(3) On an amalgamation under this section, the capital of the primary company consists of

(a) the capital that was the capital of the primary company immediately before the amalgamation, and

(b) the capital that was the capital of the other amalgamating companies other than the portion of that capital that is attributable to the shares of any amalgamating company that were held by the primary company or any other amalgamating company.

Formalities to amalgamation

275 (1) In order to effect an amalgamation under this Division,

(a) there must be filed with the registrar, on behalf of the amalgamating corporations, an amalgamation application that complies with this section, and

(b) if any of the amalgamating corporations are foreign corporations, there must be provided to the registrar the records and information the registrar may require, including, without limitation, any proof required by the registrar regarding the standing of the foreign corporation in the foreign corporation's jurisdiction, and there must be filed with the registrar any records the registrar may require, including, without limitation, an authorization for the amalgamation from the foreign corporation's jurisdiction.

(2) An amalgamation application must

(a) contain whichever of the following statements is applicable:

(i) if the amalgamation has been approved by the court, that a copy of an entered court order approving the amalgamation has been obtained under section 276 or 278 (3) (b) (ii) and has been deposited in the records office of each of the amalgamating companies;

(ii) if the amalgamation is to be effected without court approval, that all of the required affidavits under section 277 (1) have been obtained and that the affidavit obtained from each amalgamating company has been deposited in that company's records office,

(b) in the case of an amalgamation to which section 270 applies, be in the form established by the registrar and

(i) set out

(A) if the amalgamated company is to adopt as its name the name of one of the amalgamating companies, the name to be adopted as the name of the amalgamated company,

(B) if clause (A) does not apply, the name reserved for the amalgamated company under section 22, and the reservation number given for it, or

(C) if clause (A) does not apply and if a name is not reserved for the amalgamated company, a statement that the name by which the amalgamated company is to be recognized is the name created by adding "B.C. Ltd." after the incorporation number of the company, and

(ii) contain a notice of articles that reflects the information that will apply to the amalgamated company on its recognition,

(c) in the case of an amalgamation under section 273,

(i) be in the form established by the registrar for a short form amalgamation, and

(ii) adopt, as the notice of articles for the amalgamated company, the notice of articles of the holding corporation, and

(d) in the case of an amalgamation under section 274,

(i) be in the form established by the registrar for a short form amalgamation, and

(ii) adopt, as the notice of articles for the amalgamated company, the notice of articles of the amalgamating company the shares of which are not cancelled.

(3) An amalgamation application must not be submitted to the registrar for filing under subsection (1) (a) of this section unless,

(a) in the case of an amalgamation to which section 270 applies, the amalgamation agreement has been adopted by each of the amalgamating companies shown as parties to it, or

(b) in the case of an amalgamation under section 273 or 274, the amalgamation has been approved in accordance with the applicable section.

Amalgamations with court approval

276 (1) An amalgamation may be effected under section 275 with court approval, and, for that purpose, a court order approving the amalgamation must be obtained and a copy of that entered order must be deposited in the records office of each of the amalgamating companies.

(2) In order to obtain the court order required under subsection (1) of this section, an application for the order must be filed with the court at least 6 days after but not more than 2 months after,

(a) in the case of an amalgamation to which section 270 applies, the date on which the last of the amalgamating companies to adopt the amalgamation agreement does so under section 271 (1),

(b) in the case of an amalgamation under section 273, the date on which the approval required under section 273 (b) is obtained, or

(c) in the case of an amalgamation under section 274, the date on which the last of the approvals required under section 274 (a) is obtained.

(3) An amalgamating company must give to a creditor or shareholder of the amalgamating company at least 14 days' notice of the date, time and place of the hearing of an application under subsection (2) of this section if

(a) the creditor or shareholder, by written notice, requires the company to give the creditor or shareholder notice of the application, and

(b) the written notice referred to in paragraph (a) is sent to the registered office of the amalgamating company so that it is received at that office before the hearing of the application and,

(i) in the case of an amalgamation to which section 270 applies, not later than 5 weeks after the date on which the last of the amalgamating companies to adopt the amalgamation agreement does so under section 271 (1), or

(ii) in the case of an amalgamation under section 273 or 274, not later than 5 weeks after the date on which the last of the approvals required under section 273 (b) or 274 (a), as the case may be, is obtained.

(4) On an application for an order to approve an amalgamation under subsection (2) of this section,

(a) a creditor or shareholder of any of the amalgamating corporations is entitled to be heard,

(b) the court must have regard to the rights and interests of each person affected by the amalgamation, and

(c) the court may

(i) approve the amalgamation on the terms presented or substantially on those terms, or

(ii) dismiss the application.

Amalgamations without court approval

277 (1) An amalgamation may be effected under section 275 without court approval, and, for that purpose, there must be obtained from each amalgamating company, and deposited in that company's records office, an affidavit of a director or officer of that company that complies with subsection (2) of this section.

(2) The affidavit referred to in subsection (1) must

(a) state whichever of the following is applicable to the amalgamating company of which the individual making the affidavit is a director or officer:

(i) that the company has entered into an amalgamation agreement with the other amalgamating corporations and that amalgamation agreement

(A) complies with section 270, and

(B) has been adopted in accordance with section 271;

(ii) that the company proposes to amalgamate with one or more other corporations under section 273 or 274, as the case may be, and the amalgamation has been approved in accordance with section 273 or 274, as the case may be, and

(b) include whichever of the statements under subsection (3) is applicable.

(3) The affidavit referred to in subsection (1) must

(a) state that the director or officer believes and has reasonable grounds for believing that no creditor of the company will be materially prejudiced by the amalgamation, or

(b) state

(i) that the company has complied with section 278, giving particulars of the time and manner in which the required notices were sent, published or provided, as the case may be,

(ii) that the only objections in writing to the amalgamation received by the company fall into one or more of the following categories:

(A) objections on grounds that are frivolous or vexatious;

(B) objections by creditors who received a written notice under section 278 (3) (a) and who did not, within 15 days after the date of that notice, make application to the court for an order that the amalgamation not proceed;

(C) objections that have been dismissed by the court or withdrawn by the creditor, and

(iii) that the director or officer is not aware of there being any court order, or any application for a court order, that the amalgamation not proceed.

Notice to creditors in relation to an amalgamation without court approval

278 (1) Before an affidavit containing the statements referred to in section 277 (3) (b) is sworn, an amalgamating company must

(a) send to each known creditor of the company having a claim against the company that exceeds the prescribed amount, a written notice that complies with subsection (2) of this section, and

(b) publish in a newspaper that is distributed generally in the place where the company has its registered office a notice that complies with subsection (2).

(2) Each notice sent in respect of an amalgamating company under subsection (1) (a) and each notice published under subsection (1) (b) must

(a) declare the company's intention to amalgamate and specify the amalgamating corporations,

(b) include a statement by a director or officer of the company indicating that the director or officer believes and has reasonable grounds for believing that the amalgamated company will be, or will not be, as the case may be, insolvent when the amalgamation takes effect, and

(c) state that a creditor of the company who intends to object to the amalgamation must provide to the company a written notice of objection within 15 days after the sending or publication of the notice, as the case may be.

(3) If a creditor provides to the amalgamating company, in accordance with subsection (2) (c), a notice of objection, other than in respect of an objection that is frivolous or vexatious, the company must, if it intends to proceed with the amalgamation,

(a) provide to that creditor a written notice stating that the company intends to proceed with the amalgamation unless, within 15 days after the date of the notice, the court orders that the amalgamation must not proceed, or

(b) obtain whichever of the following court orders the company requires:

(i) an order, on notice to that creditor, dismissing the objection of that creditor;

(ii) an order, on notice to all creditors who have provided a notice of objection in accordance with subsection (2) (c), approving the amalgamation.

(3.1) Section 276 does not apply in respect of court orders referred to in subsection (3) (b) of this section.

(4) An amalgamation application affecting the amalgamating company must not be submitted to the registrar for filing until after the 15 day period referred to in subsection (2)
(c) of this section, and, if applicable, the 15 day period referred to in subsection (3) (a), have expired.

(5) A creditor having a claim against the amalgamating company may, whether or not that creditor receives a notice under subsection (1) (a) or (3) (a), apply to the court for an order that the proposed amalgamation not proceed.

(6) An application under subsection (5) must be made on such notice to the amalgamating company as the court may order.

Amalgamation

279 Amalgamating corporations are amalgamated and continue as an amalgamated company under this Division

(a) on the date and time that the amalgamation application referred to in section 275 (1) (a) is filed with the registrar, or

(b) subject to sections 280 and 410, and unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, if the amalgamation application specifies a date, or a date and time, on which the amalgamation is to take effect that is later than the date and time the amalgamation application is filed with the registrar,

(i) on the specified date and time, or

(ii) if no time is specified, at the beginning of the specified date.

Withdrawal of amalgamation application

280 At any time after an amalgamation application is filed with the registrar under section 275 (1) (a) and before the amalgamating corporations are amalgamated, an amalgamating corporation or any other person who appears to the registrar to be an appropriate person to do so may withdraw the amalgamation application by filing with the registrar a notice of withdrawal in the form established by the registrar identifying the amalgamation application.

Registrar's duties on amalgamation

281 After amalgamating corporations are amalgamated as an amalgamated company under this Division, the registrar must

(a) issue a certificate of amalgamation showing

(i) the name of the amalgamated company and the date and time of the amalgamation,
(ii) the names of the amalgamating corporations, and

(iii) for each amalgamating corporation that is a foreign corporation, the foreign corporation's jurisdiction,

(b) furnish to the amalgamated company the certificate of amalgamation, a certified copy of the amalgamation application and a certified copy of the notice of articles of the amalgamated company, and

(c) publish in the prescribed manner a notice of the amalgamation.

Effect of amalgamation

282 (1) At the time that amalgamating corporations are amalgamated as an amalgamated company under this Division,

(a) the amalgamation of the amalgamating corporations and their continuation as one company becomes irrevocable,
(b) the amalgamated company has, as its notice of articles,

(i) in the case of an amalgamation to which section 270 applies, the notice of articles contained in the amalgamation application,

(ii) in the case of an amalgamation under section 273, the notice of articles of the amalgamating holding corporation, or

(iii) in the case of an amalgamation under section 274, the notice of articles of the amalgamating company the shares of which are not cancelled,

(c) the amalgamated company has, as its articles,

(i) in the case of an amalgamation to which section 270 applies, the articles attached to the amalgamation agreement under section 270 (2) (d) (i) if those articles have been signed by one or more of the individuals identified in the amalgamation agreement as the directors of the amalgamated company,

(ii) in the case of an amalgamation to which section 270 applies and articles are not attached to the amalgamation agreement, or the attached articles are not signed as required under section 270 (2) (d) (i), Table 1, or, if any of the amalgamating corporations is a pre-existing reporting company;

(A) Table 1, and

(B) the Statutory Reporting Company Provisions,

(iii) in the case of an amalgamation under section 273, the articles of the amalgamating holding corporation, or

(iv) in the case of an amalgamation under section 274, the articles of the amalgamating company the shares of which are not cancelled,

(d) the amalgamated company becomes capable immediately of exercising the functions of an incorporated company,

(e) the shareholders of the amalgamated company have the powers and the liability provided in this Act,

(f) each shareholder of each amalgamating corporation is bound by the amalgamation agreement, if any,

(g) the property, rights and interests of each amalgamating corporation continue to be the property, rights and interests of the amalgamated company,

(h) the amalgamated company continues to be liable for the obligations of each amalgamating corporation,

(i) an existing cause of action, claim or liability to prosecution is unaffected,

(j) a legal proceeding being prosecuted or pending by or against an amalgamating corporation may be prosecuted, or its prosecution may be continued, as the case may be, by or against the amalgamated company, and

(k) a conviction against, or a ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated company.

(2) An amalgamation does not constitute an assignment by operation of law, a transfer or any other disposition of the property, rights and interests of an amalgamating corporation to the amalgamated company.

(3) Whether or not the requirements precedent and incidental to amalgamation have been complied with, a notation in the corporate register that corporations have been amalgamated as an amalgamated company is conclusive evidence for the purposes of this Act and for all other purposes that the corporations have been duly amalgamated on the date and time shown in the corporate register.

Appendix "E"

Business Corporations' Amendment Act, 2005
(amending the Alberta Business Corporations Act (the "ABCA")

2 Section 1 is amended

(c) by adding the following after clause (jj):

(kk) "unlimited liability corporation" means a corporation whose shareholders have unlimited liability for any liability, act or default of the corporation, as set out in section 15.2.

9 The following is added after section 15:

Part 2.1
Special Rules Respecting Unlimited Liability Corporations

Definition

15.1 For the purposes of this Part, "limited corporation" means a corporation whose shareholders are not, as shareholders, liable for any liability, act or default of the corporation except under section 38(4), 146(7) or 227(4).

Liability

15.2 The liability of each of the shareholders of a corporation incorporated under this Act as an unlimited liability corporation for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature.

Articles of incorporation, etc.

15.3 In addition to meeting the requirements of section 6, the articles of incorporation, amalgamation, amendment, continuance or conversion of an unlimited liability corporation shall contain an express statement that the liability of each of the shareholders of the unlimited liability corporation for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature.

Corporate name

15.4 (1) The name of every unlimited liability corporation shall end with the words "Unlimited Liability Corporation" or the abbreviation "ULC", and an unlimited liability corporation may use and may be legally designated by either the full or the abbreviated form.

(2) No person other than a body corporate that is an unlimited liability corporation shall carry on business within Alberta under any name or title that contains the words "Unlimited Liability Corporation" or "ULC".

Continuance of extra-provincial corporation

15.5 (1) Section 188 applies to an extra-provincial corporation continued as an unlimited liability corporation under this Act, and in addition,

(a) the property of the extra-provincial corporation continues to be the property of the unlimited liability corporation,

(b) if prior to the date shown on the certificate of continuance the shareholders of the extra-provincial corporation had unlimited liability for any liability, act or default of the extra-provincial corporation, the unlimited liability corporation and the shareholders of the unlimited liability corporation continue to be liable without limit for any liability, act or default of the extra-provincial corporation,

(c) if prior to the date shown on the certificate of continuance the shareholders of the extra-provincial corporation were not, as shareholders, liable for any liability, act or default of the extra-provincial corporation,

(i) the unlimited liability corporation continues to be liable for the obligations of the extra-provincial corporation, and

(ii) the shareholders of the unlimited liability corporation become liable without limit for any liability, act or default of the extra-provincial corporation that existed as of the date shown on the certificate of continuance and are liable without limit for any liability, act or default of the unlimited liability corporation on and from the date shown on the certificate of continuance,

(d) an existing cause of action, claim or liability to prosecution of the extra-provincial corporation includes the unlimited liability corporation and the shareholders of the unlimited liability corporation,

(e) a civil, criminal or administrative action or proceeding pending by or against the extra-provincial corporation may continue to be prosecuted by or against the unlimited liability corporation or the shareholders of the unlimited liability corporation,

(f) a conviction against, or ruling, order or judgment in favour of or against, the extra-provincial corporation may be enforced against or by the unlimited liability corporation or the shareholders of the unlimited liability corporation.

(2) When an extra-provincial corporation that was incorporated as an unlimited liability corporation is continued as a limited corporation,

(a) the shareholders of the extra-provincial corporation as it existed prior to the date shown on the certificate of continuance continue to be liable without limit for any liability, act or default of the extra-provincial corporation that existed as of the date shown on the certificate of continuance,

(b) an existing cause of action, claim or liability to prosecution is unaffected,

(c) a civil, criminal or administrative action pending by or against the extra-provincial corporation may continue to be prosecuted by or against the shareholders of the extra-provincial corporation as it existed prior to the date shown on the certificate of continuance or by or against the limited corporation, and

(d) a conviction against, or ruling, order or judgment in favour of or against, the unlimited liability corporation may be enforced against or by the shareholders of the extra-provincial corporation as it existed prior to the date shown on the certificate of continuance or against or by the limited corporation.

(3) Section 188(2) to (6) and (8) to (12) apply to an application under this section.

Conversion from unlimited liability corporation to limited corporation

15.6 (1) Sections 173 and 186(c) to (f) apply to an unlimited liability corporation that is converted to a limited corporation by amendment of its articles or by amalgamation, and in addition

(a) the shareholders of the unlimited liability corporation as it existed prior to the amendment or amalgamation continue to be liable without limit for any liability, act or default of the unlimited liability corporation that existed as of the date shown on the certificate of amendment or amalgamation,

(b) an existing cause of action, claim or liability to prosecution in unaffected,

(c) a civil, criminal or administrative action or proceeding pending by or against the unlimited liability corporation may continue to be prosecuted by or against the shareholders of the unlimited liability corporation as it existed prior to the amendment or amalgamation by or against the limited corporation, and

(d) a conviction against, or ruling, order or judgment in favour of or against, the unlimited liability corporation may be enforced by or against the shareholders of the unlimited liability corporation as it existed prior to the amendment, amalgamation or continuance or by or against the limited corporation.

(2) Section 186(a) to (c) and (g) apply to an amalgamation under this Part, and in addition, if a limited corporation amalgamates with an unlimited liability corporation and the resulting corporation is an unlimited liability corporation,

(a) the shareholders of the amalgamated unlimited liability corporation are liable for any liability, act or default of the amalgamated unlimited liability corporation, whether it arises before or after the date shown on the certificate of amalgamation,

(b) an existing cause of action, claim or liability to prosecution pertaining to the amalgamating unlimited liability corporation or the amalgamating limited corporation as it existed prior to amalgamation includes the shareholders of the amalgamated unlimited liability corporation,

(c) a civil, criminal or administrative action or proceeding pending by or against the amalgamating unlimited liability corporation or the amalgamating limited corporation as it existed prior to amalgamation may continue to be prosecuted by or against the amalgamated unlimited liability corporation or by or against the shareholders of the amalgamated unlimited liability corporation, and

(d) a conviction against, or ruling, order or judgment in favour of or against, the amalgamating unlimited liability corporation or the amalgamating limited corporation as it existed prior to amalgamation may be enforced by or against the amalgamated unlimited liability corporation or by or against the shareholders of the amalgamated unlimited liability corporation.

(3) If the articles of a limited corporation are amended to convert it to an unlimited liability corporation,

(a) the shareholders of the limited corporation as it existed prior to the date shown on the certificate of amendment

(i) become liable for any liability, act or default of the limited corporation that existed as of the date shown on the certificate of amendment, and
(ii) are liable for any liability, act or default of the unlimited liability corporation on and from the date shown on the certificate of amendment,

(b) an existing cause of action, claim or liability to prosecution includes the shareholders of the unlimited liability corporation,

(c) a civil, criminal or administrative action or proceeding pending by or against the limited corporation as of the date shown on the certificate of amendment may continue to be prosecuted by or against the unlimited liability corporation or by or against the shareholders of the unlimited liability corporation, and

(d) a conviction against, or ruling, order or judgment in favour of or against, the limited corporation as of the date shown on the certificate of amendment, may be enforced by or against the unlimited liability corporation or by or against the shareholders of the unlimited liability corporation.

Continuation of actions after dissolution

15.7 Section 227 applies to a body corporate that before its dissolution was an unlimited liability corporation, and in addition

(a) the liability of the shareholders for obligations of the unlimited liability corporation arising from actions and proceedings commenced by or against it before its dissolution or within 2 years after its dissolution is unlimited, and

(b) any shareholder, including a past shareholder, may be held responsible for the full amount of any claim against the unlimited liability corporation that originated before dissolution, regardless of the amount, if any, received by the shareholder on the distribution of the corporation's property at dissolution.

Names of unlisted shareholders

15.8 The listed shareholders of an unlimited liability corporation shall provide to the Registrar on request the names and addresses of all unlisted shareholders of the unlimited liability corporation.

Warning on certificate

15.9 (1) An unlimited liability corporation must ensure that each share certificate issued by it displays in a prominent position on the face of the certificate the information that the liability of an owner of the share or shares represented by the certificate for any liability, act or default of the unlimited liability corporation is unlimited in extent and joint and several in nature.

(2) The liability of a shareholder of an unlimited liability corporation is unaffected by any failure of the unlimited liability corporation to comply with subsection (1).

42 Section 173(1) is amended by striking out "or" at the end of clause (m) and by adding the following after clause (m):

(m.1) add or remove an express statement establishing the unlimited liability of shareholders as set out in section 15.2, or

59 Section 266 is amended

(a) by adding the following after clause (c):

(c.1) prescribing requirements for the purposes of section 131(3) and (3.1);

(b) by adding the following after clause (p):

(q) respecting unlimited liability corporations including, without limitation, regulations

(i) requiring or authorizing the filing with the Registrar of articles, amendments to articles and other documents by an unlimited liability corporation, and

(ii) prescribing the fees that may be charged by the Registrar in respect of the filing, examination or copying of any document of an unlimited liability corporation, or in respect of any action that the Registrar is required or authorized to take under this Act with regard to an unlimited liability corporation.

Appendix "F"

Companies Act (United Kingdom) ("UKCA")
Sections 49 and 50

49 Re-registration of limited company as unlimited

(1) Subject as follows, a company which is registered as limited may be re-registered as unlimited in pursuance of an application in that behalf complying with the requirements of this section.

(2) A company is excluded from re-registering under this section if it is limited by virtue of re-registration under section 44 of the Companies Act 1967 or section 51 of this Act.

(3) A public company cannot be re-registered under this section; nor can a company which has previously been re-registered as unlimited.

(4) An application under this section must be in the prescribed form and be signed by a director or the secretary of the company, and be lodged with the registrar of companies, together with the documents specified in subsection (8) below.

(5) The application must set out such alterations in the company's memorandum as--

(a) if it is to have a share capital, are requisite to bring it (in substance and in form) into conformity with the requirements of this Act with respect to the memorandum of a company to be formed as an unlimited company having a share capital; or

(b) if it is not to have a share capital, are requisite in the circumstances.

(6) If articles have been registered, the application must set out such alterations in them as--

(a) if the company is to have a share capital, are requisite to bring the articles (in substance and in form) into conformity with the requirements of this Act with respect to the articles of a company to be formed as an unlimited company having a share capital; or

(b) if the company is not to have a share capital, are requisite in the circumstances.

(7) If articles have not been registered, the application must have annexed to it, and request the registration of, printed articles; and these must, if the company is to have a share capital, comply with the requirements mentioned in subsection (6)(a) and, if not, be articles appropriate to the circumstances.

(8) The documents to be lodged with the registrar are--

(a) the prescribed form of assent to the company's being registered as unlimited, subscribed by or on behalf of all the members of the company;

(b) subject to subsection (8A), a statutory declaration made by the directors of the company--

(i) that the persons by whom or on whose behalf the form of assent is subscribed constitute the whole membership of the company, and

(ii) if any of the members have not subscribed that form themselves, that the directors have taken all reasonable steps to satisfy themselves that each person who subscribed it on behalf of a member was lawfully empowered to do so;

(c) a printed copy of the memorandum incorporating the alterations in it set out in the application; and

(d) if articles have been registered, a printed copy of them incorporating the alterations set out in the application.

(8A) In place of the lodging of a statutory declaration under paragraph (b) of subsection (8), there may be delivered to the registrar of companies using electronic communications a statement made by the directors of the company as to the matters set out in sub-paragraphs (i) and (ii) of that paragraph.

(8B) Any person who makes a false statement under subsection (8A) which he knows to be false or does not believe to be true is liable to imprisonment or a fine, or both.

(9) For purposes of this section--

(a) subscription to a form of assent by the legal personal representative of a deceased member of a company is deemed subscription by him; and

(b) a trustee in bankruptcy of a member of a company is, to the exclusion of the latter, deemed a member of the company.

50 Certificate of re-registration under s 49

(1) The registrar of companies shall retain the application and other documents lodged with him under section 49 and shall--

(a) if articles are annexed to the application, register them; and

(b) issue to the company a certificate of incorporation appropriate to the status to be assumed by it by virtue of that section.

(2) On the issue of the certificate--

(a) the status of the company, by virtue of the issue, is changed from limited to unlimited; and

(b) the alterations in the memorandum set out in the application and (if articles have been previously registered) any alterations to the articles so set out take effect as if duly made by resolution of the company; and

(c) the provisions of this Act apply accordingly to the memorandum and articles as altered.

(3) The certificate is conclusive evidence that the requirements of section 49 in respect of re-registration and of matters precedent and incidental to it have been complied with, and that the company was authorised to be re-registered under this Act in pursuance of that section and was duly so re-registered.

4. THE ROLE OF THE COURT IN REDUCTIONS OF CAPITAL

A. INTRODUCTION

Nova Scotia is the last jurisdiction in Canada where reductions of a company's capital require court approval. The primary purpose of the court's involvement is to ensure that the interests of creditors and members of the company are protected by preventing the company from being "stripped" of its assets. Other jurisdictions in Canada address creditor and member concerns by (1) placing statutory restrictions on when capital may be reduced; (2) providing creditor remedies in the event capital is distributed contrary to the legislated criteria; and (3) through the provision of oppression remedies in cases where the conduct of the majority of the shareholders of the company is oppressive or unfairly prejudicial to the interests of certain minority shareholders.

The reason for the requirement for court involvement in reductions of share capital is neatly summed up in a comment from the "British Columbia Company Act Discussion Paper":

> Creditors are entitled to assume that the capital of the company will not be deliberately impaired to their prejudice. Members are entitled to assume that the capital they contributed to the company will not be paid out except for bona fide commercial purposes.[6]

A.F. Topham summarizes the court's involvement in reductions of capital in terms of protection of creditors as follows:

> The general rule or principle of the Act [English Companies Act, 1948] is, that the capital of a company is not to be reduced without the sanction of the court in any case where the rights of creditors are affected, and for this reason: the creditors of a company are invited to deal with the company on the footing of its registered capital being a reality, of the registered shareholders being liable for the unpaid portions of their shares, and of the company having received the paid-up capital which appears in its register and in the returns to the Registrar of Joint Stock Companies, and if this liability to pay-up were released or the paid-up capital returned to shareholders, or the creditor's security in any manner given away or tampered with, it would seriously alter their position.[7]

---

[6] Province of British Columbia – Ministry of Finance and Corporate Relations, January 1991) at 51.

[7] A.F. Topham, Palmers Company Law, 19th ed. (London: Stevens & Sons Limited, 1949) at 74.

The purpose of this chapter is to determine whether it is desirable to continue to involve the Supreme Court of Nova Scotia (the "court") in reductions of capital under the NSCA and, if so, to what degree.

This chapter will begin with a review of what is meant by "reduction of capital". The provisions of the NSCA that deal with reductions of capital will then be examined in detail, followed by an examination of how reductions of capital are legislatively addressed in other Canadian jurisdictions. The section will conclude with a recommendation on how the NSCA should be amended to permit more efficient and cost-effective reductions of capital by Nova Scotia companies, while at the same time ensuring the protection of creditors and minority shareholders.

"Capital" is an oft-used term in discussions involving company law and it may embody different meanings depending on the context in which it is used. For example, "capital" may be used to describe the assets of a company. In memoranda of association of Nova Scotia companies, "capital" is used to describe the maximum number of shares the company is authorized to issue (a.k.a. – "authorized capital"). "Capital" may also be used to describe the historic amount contributed by members in exchange for shares of a company (a.k.a. – "share capital", "paid-up capital' or "stated capital"). It is the latter use of the term that is relevant to a discussion of reductions of capital pursuant to Canadian statute law.

This chapter examines reductions of share capital. Distribution of a company's property in specie pursuant to paragraphs 19(1)(g) and 26(4)(h) of the NSCA does not form part of this chapter's subject matter. However, it should be noted that these provisions state that the distribution of a company's property in specie is subject to the same rules as those imposed for reductions of capital. Thus, any changes to the NSCA's reduction of share capital provisions will have an impact on how a company is able to distribute its property to its members.

The NSCA embodies the concept of "paid-up capital". The balance of corporate legislation in Canada uses the "stated capital" concept. Robert R. Pennington defines "paid-up capital" as:

> The total amount paid-up by shareholders on the shares they have taken.[8]

Professor J. Anthony Van Duzer defines "stated capital" as follows:

> Stated capital for a class or series is simply the historical total of the amount paid into the corporation in return for the issuance of shares of that class or series.[9]

---

[8] Robert R. Pennington, Company Law, 2nd ed. (London: Butterworths, 1967) at 129.

Based on the foregoing definitions, it appears paid-up capital and stated capital are essentially different terms for the same concept (i.e. – the historic amount paid to the company by shareholders for shares in the capital stock of the company).

The NSCA uses the term "share capital" in the context of reduction of capital. The term is not, unfortunately, defined in the statute. Based on our revision of the NSCA, we understand "share capital" to mean total nominal value of the shares that have been issued to shareholders (a.k.a. "issued capital"). "Paid-up share capital" or "paid-up capital" as used in the NSCA is the amount actually paid to the company for issued shares. "Unpaid share capital" or "unpaid capital" is the amount remaining to be paid on issued shares.

Reductions of capital may only be made in accordance with the legislation under which the company is governed. Statute law in Nova Scotia has tended to follow the common law with respect to reductions of capital. Lord Watson, in the House of Lords decision in Trevor v. Whitworth, sets out the common law for reductions of capital:

> One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.[10]

---

[9] J. Anthony Van Duzer, The Law of Partnerships and Corporations, 2nd ed. (Toronto: Irwin Law Inc., 2003) at 207.

[10] [1887] 12 A.C. 409 at 423.

B. NSCA

There are three areas in the NSCA that deal with reductions of share capital. The general reduction of capital provisions are found in sections 57-67. Section 49 is an interesting provision that permits a company to return profits to its members by way of a reduction of capital. Subsection 51(14) addresses reductions of capital in the context of the capital redemption reserve funds required pursuant to the NSCA when a company redeems or purchases preference shares out of the profits of the company. These provisions are reproduced in Appendix "A".

SECTIONS 57-67

Subsection 57(1) provides that a limited liability company may reduce its share capital in "any way", including:

(a) extinguishing or reducing the liability on any of its shares for which share capital is not paid-up;

(b) cancelling any paid-up share capital which is lost or unrepresented by available assets; or

(c) paying off, either by way of cash or distribution of property in specie, any paid-up share capital in excess of the wants of the company.

(a) Extinguishing/Reducing Liability for Paid-Up Capital

Pursuant to paragraph 57(1)(a), a company may pass a special resolution and request that a court approve the extinguishment or reduction of the liability of all or some of its members for amounts unpaid on shares purchased in the company.

For example, assume a company has two shareholders – Shareholder A and Shareholder B – and issues 10 common shares to each with a subscription price of $1 per share. Shareholder A pays the full subscription price of $10. Shareholder B pays only $8. The share capital on the company's books is $20. The paid-up capital of the company is $18, with Shareholder B being subject to a call of $2 on its partially paid shares.

If, for whatever reason, the company determines that it will extinguish the $2 in unpaid capital owing from Shareholder B, the company must pass a special resolution and apply to a court to have the resolution approved. In share terms, each shareholder's holdings do not change (i.e. – both shareholders will still hold ten common shares in the company). The company simply foregoes the right to call on Shareholder B for the unpaid capital of $2.

The risk to creditors with this method of reduction is that the creditors' capital cover is reduced. In other words, following the reduction, the company will no longer have the ability to call upon its members for unpaid capital.

The prejudice to shareholders is to those who have paid full value for their shares (i.e. – in the above example, Shareholder A). However, the reduction can only take place if a special resolution (i.e. – three-quarters of members entitled to vote) has been passed. For shareholders who hold less than 26% of the voting shares of a company, their remedy is an oppression action under the Third Schedule.

Preference shareholders with a priority for repayment of capital on wind-up also stand to lose in an elimination or reduction of unpaid capital. The reason for this is that if, on a wind-up, there are not sufficient resources to retire the company's liabilities, the contributions made by the shareholders (including those made by preference shareholders) may have to go to repaying the company's liabilities, thus reducing or eliminating the "preference" of the preference shareholders.

(b) Cancellation of Paid-Up Capital Which is Lost or Unrepresented by Available Assets

Pursuant to section 57(1)(b) of the NSCA, a company may cancel any paid-up share capital that has been lost or is unrepresented by available assets. According to Professor Pennington, this situation occurs as a result of one of the following:

(a) the company's assets were never equal in value to the paid-up capital because the company issued shares for assets worth less than the subscription price of the shares;

(b) the company suffered trading losses; or

(c) the value of the company's assets decreased.[11]

A company may want to take advantage of the reduction of capital provisions in the NSCA to improve its balance sheet. This may be particularly relevant if the company needs to meet one of the financial tests included in the NSCA (e.g. – section 51).

Another use of this type of reduction occurs when a company suffers a business disaster. The company is able to admit the loss and write it off and then be in a position to resume the payment of dividends. Because dividends are paid out of the profits of a company, and because paid-up capital is shown in the debit column of a company's balance sheet (although not technically a debt of the company), a company that wishes to issue dividends will want to ensure that its share capital matches as closely as possible (and, in any event, does not exceed) the value of its assets.

---

[11] Supra note 7 at 157.

In terms of risk to creditors, cancellation of paid-up share capital which is lost or unrepresented by available assets does not theoretically affect their interests. The reason for this is that this type of reduction does not result in any actual capital (i.e. - $ or assets) leaving the company. The reduction is essentially a bookkeeping function, which serves to provide a more accurate picture of the actual value of the assets available to creditors in the event of default by the company of its obligations.

However, as Professor Pennington indicates, the risk to creditors is that a company may pretend to have suffered a loss in order to benefit its members.[12] In this event, following the reduction, the company would be in a position to distribute assets to its members in the form of a dividend (assuming its assets exceed its liabilities following the reduction) and creditors would be deprived of assets available in the event the company defaults on its obligations. This presumably is why the courts are involved in this type of reduction (i.e. - to ensure that the cancellation of paid-up capital does not exceed the actual loss suffered by the company).

(c) Distribution of Paid-Up Share Capital in Excess of the Wants of the Company

Paragraph 57(1)(c) of the NSCA expressly authorizes a company to reduce paid-up capital that is in excess of the needs of the company. The reduction may take the form of a cash payment or a distribution of the company's property in specie. A company may find itself in this position as a result of a favourable sale of company assets. A company may also want to avail itself of paragraph 57(1)(c) to take advantage of favourable financing rates. For example, if a company raises share capital at a time when interest rates are high (and thus has to pay a high dividend rate), the company may want to refinance its operations by replacing the high dividend shares with shares having a more favourable rate. What the company is doing in this situation is essentially redeeming shares by distributing paid-up capital.

The risk to creditors in this form of reduction is similar to that for reductions/eliminations of unpaid share capital. A return of paid-up capital results in less available capital in the company for creditors in the event the company defaults on any of its obligations.

With respect to shareholders and payouts of paid-up capital, preference shares with a priority on repayment on windup must receive the capital return prior to ordinary shareholders to ensure the preference is not lost.

(d) Creditor Protection Under sections 57-67 of the NSCA

Under the general reduction of capital provisions of the NSCA (sections 57-67), the ability to reduce capital must be included in the articles of association of the limited liability company and a special resolution authorizing the reduction must be passed (and confirmed where necessary) by the shareholders of the company. Further, the reduction of capital must be confirmed by the court and the company's memorandum of association altered to reflect the reduction (by way of a court approval minute filed with the Registrar).

---

[12] Ibid. at 159.

The creditors of the company become involved in the reduction of capital process in one of three circumstances:

(a) where the reduction of capital results in a diminution of shareholder liability with respect to unpaid share capital;

(b) where the reduction is in the form of a payout of paid-up share capital; and

(c) where the court so directs.

Section 59 sets out how the concerns of creditors are to be addressed in a reduction of capital:

- Every creditor of the company who, at a date fixed by the court, is entitled to any debt or claim which, if the company were to be wound up, would be admissible in proof against the company, is entitled to object to the reduction.
- The court settles a list of creditors entitled to object, including, where possible, the nature and amounts of the debts and claims.
- The court is authorized by section 59 to fix a date following which creditors not on the creditor list are excluded from the right to object to the reduction. Creditors must either be paid out or consent to the reduction.
- If neither consent nor payout is obtained, the court may dispense with the consent if the company secures payment of the debtor claim by appropriating either the full amount of the claim (where the company admits the full amount is payable) or such other amount as the court determines.
- Additionally, the court has the authority to do away with the creditor protection set out in section 59 if it deems it appropriate to do so in light of "special circumstances".

If the court is satisfied that the rights of creditors have been properly accounted for, it may approve the reduction of capital. The approval is on such terms and conditions as the court thinks fit. The court is authorized to require a company to add "and reduced" at the end of its name. The court may also require the company to publish the reasons for the reduction or such other information as the court determines necessary for the purposes of giving proper notice of the reduction to the public.

The Registrar is required to register (1) a copy of the court's order, certified by the Prothonotary or a clerk confirming the reduction of share capital; and (2) a minute approved by the court showing with respect to the share capital of the company, as altered by the reduction:

(a) the amount of the share capital;

(b) the number of shares into which the capital is to be divided;

(c) the amount of each share; and

(d) the amount, if any, at the date of registration, deemed to be paid-up on each share.

Upon the registration of the order and minute, the special resolution authorizing the reduction of capital becomes effective. The certification by the Registrar of the order and minute is conclusive evidence that all reduction of capital requirements of the NSCA have been complied with and that the share capital of the company is as stated in the minute.

Section 64 of the NSCA provides additional creditor protection in the context of reductions of capital. This provision states that the liability of a member of a company for calls or contributions is limited to the difference between the amount paid by that member for the shares (or the reduced amount deemed to have been paid) and the amount of the shares fixed by the minute. However, if a creditor of the company failed to object to the reduction in respect of any debt or claim because of reasons of (1) ignorance of the proceedings; or (2) ignorance of the nature and effect of the proceedings with respect to its claim, then the member is liable to contribute to the debt or claim the following:

(a) if the company is not wound up, every member who was a member of the company as of the date of registration of the order for the reduction is liable to contribute the amount the member would have been liable to contribute if the company were wound up on the day before the registration of the order; or

(b) if the company is wound up, the court may, on the application of the creditor and proof of the creditor's ignorance, settle a list of persons liable to contribute and make and enforce calls and orders on the listed contributors.

Thus, the NSCA protects ignorant creditors by essentially undoing the reduction where a company is not wound up (thus increasing the amount of share capital available to the creditor) and authorizing the court to step in and determine who shall contribute when the company is wound up.

Section 67 provides that a company limited by guarantee, if it has share capital, may reduce that share capital in the same manner as a limited liability company.

(e) Shareholder Protection Under the NSCA

Unlike creditors, there is no express protection of shareholders in the reduction of capital provisions of the NSCA. However, courts have held that part of a court's consideration of a reduction of capital application may involve consideration of the rights of shareholders. Lord Herschell, in The House of Lords decision in British and American Trustee and Finance Corporation, Limited v. John Couper states:

> I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of that dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court. ...
>
> There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.[13]

Later in the same decision, Lord MacNaghten provides:

> The Companies Act 1867 declares that any company limited by shares may by special resolution so far modify the conditions contained in its memorandum, if authorized to do so by its regulations as originally framed or as altered by special resolution, as to reduce its capital. The power is general. The exercise of the power is fenced round by safeguards which are calculated to protect the interests of creditors, the interests of shareholders, and the interests of the public. Creditors are protected by express provisions. Their consent must be procured or their claims must be satisfied.

---

[13] [1894] A.C. 399 at 406.

> The public, the shareholders, and every class of shareholders individually and collectively are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect, though all the creditors have been satisfied.[14]

SECTION 49

Section 49 permits a company to return undivided profits to members of the company as a reduction of the paid-up capital of the company. The company is required to pass a special resolution authorizing the return and to file a memorandum with the Registrar showing the particulars of the reduction.

Subsection (5) provides that the power of the directors of the company to make calls with respect to the amount unpaid on shares extends to the amount unpaid on share capital as augmented by the section 49 reduction. For example, suppose that a shareholder has paid $90 on a share with an issue price of $100. If the company pays out a portion of its profits as a reduction of paid-up capital in an amount equal to $10 per share, that shareholder is liable for a call of up to $20 on its shares (i.e. – the original $10 unpaid capital, plus the $10 paid out as a reduction of paid-up capital).

It is unclear whether a return of paid-up capital pursuant to section 49 requires the consent of the court. The cause of the uncertainty is found in subsection (2) which states that the special resolution passed by the company in regards to the reduction does not take effect until "a memorandum showing the particulars required by this Act in the case of a reduction of share capital" has been sent to and registered in the Registry of Joint Stock Companies. The provision goes on to state that the "other provisions of this Act with respect to reductions of share capital" do not apply to a return of paid-up capital pursuant to section 49. It is unclear what is meant by the reference to a memorandum. There is no memorandum required pursuant to any of the provisions in the NSCA that address reductions of capital. The most analogous document appears to be the minute referenced in subsection 61(1). This provision requires that a company file a court-approved minute with the Registrar that describes the share capital of the company as altered by the reduction of capital.

The uncertainty is whether the reference to "memorandum" in subsection 49(2) is to the subsection 61(1) minute; and assuming the foregoing is correct, whether the minute is required to be approved by the court for purposes of section 49.

The nature of the reduction would suggest that the court is not required to approve a minute respecting a return of paid-up capital pursuant to section 49. The capital to be returned to members is capital that is otherwise available for payment to shareholders in the form of a dividend or bonus. Payment of dividends and bonuses do not require court approval. Thus, assuming the purpose of section 49 is to provide an alternate means of returning the company's profit to its shareholders, court approval appears unnecessary.

---

[14] Ibid. at 411.

What is more uncertain is when this provision is used. We have traced the origins of section 49 to pre-1880. We have not found a similar provision in any of the UK Companies Acts reviewed. It is unclear why the Nova Scotia Legislature included it in the NSCA.

SECTION 51

Section 51 deals with reductions of capital in the context of the redemption or repurchase of shares issued by a company. Subsections (5), (7) and (9) provide financial tests that must be met for the redemption/repurchase of shares. Subsection (14) deals specifically with the repurchase by a company of its redeemable preference shares. The subsection provides that preference shares may only be redeemed out of proceeds from a fresh share issuance or from profits. Under the latter scenario, a company is required to create a capital redemption reserve fund and allocate an amount to the fund equal to the amount used to redeem or purchase the shares. Distribution of the fund to members may only be done in conjunction with the reduction of capital provisions in the NSCA (unlike the other reduction of capital through the repurchase/redemption of shares provisions – subsections (5), (7) and (9) - which do not require court approval). The money in the fund is treated like paid-up capital for purposes of reductions of capital.

The purpose of these provisions is to ensure that the capital of a company is not stripped through preference share redemptions. The fund ensures that any capital that was represented by paid-up capital on the preference shares prior to the share redemption stays in the company, except in accordance with the reduction of capital provisions in sections 57-67. In short, the fund cannot be distributed by a company unless (1) the company passes a special resolution authorizing the distribution, and (2) a court approves the distribution.

C. REDUCTIONS OF CAPITAL BY UNLIMITED LIABILITY COMPANIES

Sections 57-67 only apply to reductions of capital for limited liability companies. L.C.B. Gower describes the essential difference between a limited liability company and a ULC:

> It [a limited liability company] has no personal character to be trusted; but, unless trust is reposed in it, it will be unable to survive in competition with its rivals. It may want to raise capital, beyond that subscribed by its members, by borrowings; or it may need to buy commodities on credit; in any event it will be vital, if it is to dispose of its goods or

> services, that third parties shall be able to trust it properly to fulfill its contracts. The company has only its capital to back its credit, and this being so it is essential that the capital should be more clearly defined and inviolable than is the case with an individual or partnership. Hence the law has worked out certain principles relating to the raising and maintaining of capital. In effect, capital has ceased to be a name given to the fluctuating net worth of the business and has become a ridged yard stick fixing minimum value of the net assets which must be raised initially and then, so far as possible, retained in the business. These principles have no application to unlimited companies and have been worked out in relation only to companies limited by shares. They are primarily intended for the protection of creditors . . . but, like the ultra vires rule, they are also designed to protect shareholders, present and future, against action by the directors which might covertly diminish the value of their shares as long-term investments.[15]

Justice Vaughan Williams, in Re: Borough Commercial and Building Society states:

> I am of the opinion further, having carefully looked through the Companies Acts, 1862 and 1867, that there is nothing to prevent a company unlimited from providing by its memorandum of association and its articles for a return of capital to its members of the partnership or for withdrawal of members from the company.[16]

Vaughan Williams, J. further provides that:

> By the very force of the terms it is plain, that in the case of an unlimited company the creditors know that there is no fixed capital, and, therefore, they have no right to complain, if I may use the term, of a reduction of that which has never been fixed in any way.[17]

Although not expressly stated in the NSCA, it appears that a ULC may reduce its capital by simply passing a special resolution authorizing the reduction (i.e. - court approval of the special resolution is not required). The court's involvement is less clear if the reduction of capital involves the repurchase by a company of its shares. The source of the uncertainty is the language employed in subsections 51(5) and (6). Subsection 51(1) permits the alteration of a company's memorandum of association. The provision is expressly limited to companies limited by shares. However, this limited application is not repeated in subsections (5) and (6). Subsection (5) states that a "company" (which, for purposes of the NSCA, includes a ULC), if authorized by special resolution, may repurchase or otherwise acquire shares issued by it. The caveat is that the company must meet the financial tests provided in subsection (6).

---

[15] L.C.B. Gower, Gower's Principles of Modern Company Law, 4th ed. (London: Stevens & Sons Limited, 1979) at 216.

[16] [1893] 2 Ch. 242 (Ch. D.) at 253.

[17] Ibid. at 255.

Applying rules of statutory interpretation to the provisions in question supports the conclusion that subsections 51(5) and (6) do not apply to ULCs. For a review of the rules of interpretation and their application to these provisions, please see Paul W. Festeryga's article entitled "Nova Scotia Unlimited Liability Companies: What Are They and How Do They Work?".[18] However, until the provisions are amended to remove this uncertainty, there remains an element of doubt as to whether reductions of capital involving the reacquisition by a ULC of its shares require court approval.

D. OTHER JURISDICTIONS

CANADA

The CBCA addresses reductions of capital in section 38 (see Appendix "B"). A CBCA corporation is entitled to reduce its capital for "any purpose", including the following:

(a) to extinguish or reduce a liability for an amount unpaid on any share;

(b) to distribute to the holder of an issued share of any class or series of shares an amount not to exceed the stated capital of that class/series; and

(c) to reduce stated capital by an amount that is not represented by realizable assets.

It is unclear why the CBCA provides for the right to extinguish or reduce liabilities for an amount unpaid on any share. The reason for the uncertainty is because subsection 25(3) of the CBCA states that a share cannot be issued until the consideration is fully paid in money, property or services. Thus, partly paid shares are not permitted under the CBCA and it appears that it is not possible for liability to exist for an amount unpaid on a share.

A special resolution is required for a CBCA corporation to reduce its capital. However, the resolution is not subject to the confirmation of a court. In place of court approval, the CBCA imposes two measures to ensure creditor protection. The first is found in the form of two financial tests that the company must meet before the reduction can occur. The second is that creditors may compel shareholders to repay or redeliver any liability that was extinguished or reduced or any money or property that was paid or distributed contrary to section 38.

---

[18] Report of the Proceedings of the Fiftieth Tax Conference, Canadian Tax Foundation, 1998, 17:1-28.

The two financial tests are as follows:

(a) Solvency Test: The corporation must be able to pay its liabilities as they become due following the reduction; and

(b) Capital Impairment Test: The realizable value of the assets of the corporation cannot be less than the aggregate of its liabilities following the reduction.

Subsection 38(4) provides the creditor protection. If a reduction of capital is made contrary to section 38, a creditor may apply to a court for an order compelling a shareholder or other recipient of the reduction to:

(a) pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced; and

(b) pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or by the other recipient pursuant to the capital reduction.

The aggrieved creditor must commence an action not later than two years from the date of the reduction.

Please note that the financial tests only apply if the corporation is extinguishing or reducing liability with respect to unpaid share capital (which, as noted above, appears to be irrelevant to a CBCA company) and where the corporation proposes to return paid-up capital to shareholders. The tests do not apply where a corporation is reducing its stated capital by an amount that is not represented by realizable assets. The drafters of the CBCA appear to have accepted the general notion that reducing stated capital where the capital is not represented by assets is not a detriment to creditors as there is no reduction of the asset base available to creditors if the corporation defaults on its obligations. A creditor would have a remedy against the shareholders pursuant to subsection 38(4) if the reduction was undertaken contrary to the CBCA (i.e. – the company reduced its capital by an amount greater than what was available in terms of realizable assets).

Subsection 39(3) requires a corporation to adjust its stated capital account in recognition of the reduction of capital.

ALBERTA

The ABCA generally follows the CBCA model, with one apparent exception. Subsection 38(6) of the ABCA provides that a director's liability pursuant to section 118 is not affected by the reduction of capital provisions (see Appendix "C"). Section 118 imposes liability on directors who authorize certain transactions contrary to the provisions of the ABCA (e.g. – share issuances for consideration other than money, purchase redemptions or other acquisitions of the corporation's shares, dividends and financial assistance). However, section 118 does not impose liability on directors for reductions of capital. Thus, despite appearances, the directors of an ABCA corporation are not exposed to liability in relation to reductions of capital. Liability for reductions made contrary to the ABCA rests solely with the shareholders.

The corporate legislation in Manitoba, Saskatchewan, the Northwest Territories and the Yukon Territory generally mirrors the language used in the ABCA.

BRITISH COLUMBIA

The intent of the BCBCA is to provide flexibility in terms of reductions of capital. According to section 74 (see Appendix "D"), a BCBCA corporation may proceed with a reduction of capital either by way of court order or special resolution. In order to proceed with a reduction by way of special resolution only, the corporation must meet a solvency test. According to John Lundell[19], the intent of the legislation was to enable corporations to reduce capital by way of special resolution if the realizable value of the corporation's assets following the reduction exceeded its liabilities. However, there is a flaw in the solvency test contained in paragraph 74(1)(b) of the BCBCA. The section provides that a company may reduce its capital by special resolution on court order if:

> (b) the capital is reduced to an amount that is not less than the realizable value of the company's assets less its liabilities. . .

The reference to "reduced to" should be to "reduced by". The problem with the current language is that it has the opposite effect to that intended. For example, if a company has assets with a realizable value of $100 and liabilities of $75, according to the current paragraph 74(1)(b) this would permit the corporation to reduce its capital to $25. If $75 of capital is deducted from assets with the value of $100, the corporation will be unable to meet its liabilities of $75 (i.e. – the corporation will be $50 short). Mr. Lundell has indicated that paragraph 74(1)(b) is a drafting error and he expects the BCBCA to be amended shortly to rectify the oversight.

Under section 75 of the BCBCA, a corporation may undertake any of the following without obtaining a special resolution or court order and without changing its authorized share structure:

> (a) a redemption or repurchase of its own shares as permitted under the Act;

---

[19] Supra note 2.

(b) an acceptance of a surrender of shares by way of gift or for cancellation; or

(c) a conversion of fractional shares into whole shares on a subdivision, consolidation, redemption, purchase or surrender in accordance with the BCBCA.

The flexibility of the BCBCA may be seen in the ability of a corporation to reduce capital either by way of special resolution or court order. Due to the time and expense involved with making a court application, it is difficult to imagine why a corporation would proceed with a reduction by way of court order, unless absolutely necessary (e.g. – the corporation fails to meet the solvency test). Thus, the BCBCA provides that reductions of capital may be made by both solvent and insolvent corporations – solvent corporations by way of special resolution and insolvent corporations by way of court order. In the latter case, although not specified in the BCBCA, it would be reasonable to expect that a court would require the satisfaction of generally the same criteria that must be satisfied under the NSCA (i.e. - a settled list of creditors and consents of those creditors where the court deems necessary).

NEW BRUNSWICK

The NBBCA substantially follows the CBCA model. Pursuant to section 35 (see Appendix "E"), corporations are entitled to reduce capital for "any purpose" including the three specified purposes in section 35 of the CBCA, with one modification. Corporations are entitled to extinguish or reduce liabilities in respect of amounts unpaid on any shares issued before a corporation is continued. This caveat likely was added to the NBBCA to address the issue of partially paid shares noted above for CBCA companies (i.e. – a NBBCA company cannot issue partially paid shares).

The financial tests in the NBBCA are the same as the solvency and capital impairment tests in the CBCA. However, the tests are only applied to reductions of capital where the New Brunswick corporation is seeking to extinguish or reduce a liability in respect of any amount unpaid on any share issued before a corporation is continued. It is unclear why the New Brunswick Legislature would want to limit the protection to creditors afforded by the financial tests to only reductions of capital for shares issued before a corporation is continued (i.e. – why did the New Brunswick Legislature determine there is no need to protect creditors where a company proposes to distribute paid-up capital to shareholders?).

NEWFOUNDLAND & LABRADOR

The NLCA eliminates reductions of capital for "any purpose". Reductions may only be undertaken for three specific purposes (section 67: see Appendix "F"):

(a) extinguishing or reducing liabilities in respect of unpaid amounts on shares;

(b) returning amounts in respect of consideration received by the corporation for issued shares (regardless of whether the corporation purchases, redeems or otherwise acquires the shares or a fraction thereof); and

(c) reducing stated capital by amounts that are not represented by realizable assets.

The financial tests are the same as those found in the CBCA. However, they are only applicable where a corporation seeks to reduce its capital to extinguish or reduce liabilities in respect of unpaid amounts on shares and where paid-up capital is to be returned to shareholders (i.e. – items (a) and (b) respectively).

ONTARIO

Reductions of capital under Ontario law are found in sections 34 and 35 (see Appendix "G"). The OBCA contains the reductions for "any purpose" language and adds a further catch-all that corporations are entitled to reduce their capital by amounts "otherwise determined in respect of which no amount is to be distributed to holders of issued shares of the corporation". The OBCA expressly permits a class/series of shareholders that is affected differently from any other class/series of shareholders as a result of the capital alteration to vote separately as a class on the reduction. The OBCA also permits an action to be brought against one or more shareholders as representatives of a shareholder class where a reduction of capital is contrary to the OBCA. The balance of the reduction of capital provisions in the OBCA mirror those found in the ABCA.

QUEBEC

The QCA provides for different reduction of capital provisions for letters patent companies and limited liability companies (sections 58-65: see Appendix "H"). The letters patent reduction provisions are very similar to those found in the NSCA, with one key difference. Under the QCA, it is the registrar, not the court, who ensures the protection of creditors. Although there is no express requirement that the by-law approving the reduction of capital be approved by the registrar, the QCA does provide that where the proposed reduction involves either an extinction or diminution of liability in respect of unpaid share capital or the return to any shareholder of paid-up capital and "in any other case" where the registrar so directs, every creditor of the company is entitled to object to the reduction. The creditor protection provisions essentially mirror those found in the NSCA, with the enterprise registrar being required to settle a list of creditors entitled to object and then ensuring each of the objections of the creditors is properly addressed. The QCA also contains provisions identical to that found in the NSCA for shareholder liability for creditor claims where the creditors have not been added to the settled list.

For reductions of capital by limited liability companies under the QCA, the model for reductions of capital generally follows that of the CBCA (sections 123.62 – 123.65: see Appendix "H"). However, there is one important exception. Directors, not shareholders, are liable for improper reductions of capital. This is despite the fact that the directors' by-law authorizing the reduction of capital must be approved by not less than two-thirds of the shareholders of the company.

E. RECOMMENDATION

We are of the opinion that the underlying principles to be applied to amendments of the NSCA with respect to reductions of share capital should include the following:

(a) Efficiency: The NSCA is primarily a statute to govern companies in Nova Scotia. It is not a creditors' protection act. Wherever possible, it should facilitate efficient, simple internal transactions. Decisions regarding the internal structure of a Nova Scotia company should be made by those who understand the company best – the company's officers, directors and shareholders.

(b) Creditor Protection: Although the foregoing principle provided that the NSCA is designed primarily to regulate corporate entities, to ensure the integrity and proper conduct of business and to ensure the "trust" required for the survival of limited liability companies, as stated by Professor Gower above, reasonable measures must be in place to ensure the protection of creditors' interests.

(c) Minority Shareholder Protection: The protection of the interests of minority shareholders in reductions of capital is an area that is properly included in company's legislation and must be a consideration when drafting amendments to the existing reduction provisions.

Based on the foregoing principles, it is submitted that the drafters of the amendments to the reduction of share capital provisions in the NSCA should endeavour to draw upon the best of the existing reduction of capital provisions in Canadian legislation.

It is suggested that consideration should be given to adopting provisions similar to those in the BCBCA. As indicated above, the BCBCA endeavours to provide flexibility through permitting reductions of capital by way of both special resolution and court order.

It is important that any amendments to the NSCA expressly provide mechanisms to ensure that the interests of creditors are protected where the reduction is by special resolution. This may be accomplished by requiring the company to meet reasonable financial tests before the reduction can occur. It is further suggested that the financial tests include both a solvency and a capital impairment test. The rationale for this is that it is important that a company be able to meet its day-to-day obligations as they become due (solvency test), while at the same time ensuring that a "capital cushion" remains intact to protect creditors if the company is unable to meet its obligations (capital impairment test). Further, the interests of creditors may be protected by placing liability for reductions made contrary to the stated financial tests on the shareholders of the company.

We do not believe that any amendments are required to the NSCA to ensure the protection of shareholders in reduction of capital proceedings. The Third Schedule of the NSCA already provides for class votes where a company resolves to amend its memorandum or articles to:

(a) effect an exchange, reclassification or cancellation of all or part of the shares of a class (paragraph 2(2)(b)); and

(b) add, change or remove the rights, privileges, restrictions or conditions attached to shares of a class (paragraph 2(2)(c)).

Additionally, and perhaps more to the point, section 5 of the Third Schedule provides for oppression remedies in the event that the company undertakes an act which is oppressive or unfairly prejudicial to, or that unfairly disregards, the interests of any shareholder.

The ability of a company to proceed with a reduction of capital by way of a court order where the company fails to meet the financial tests prescribed by the NSCA would provide a measure of flexibility that may be useful to companies in certain situations. For example, a holding company may wish to return capital to its parent shareholder. Assuming the holding company's only creditor and shareholder is the parent company, there does not appear to be any reason not to permit a return of capital even if the holding company fails to meet the solvency and capital impairment tests.

Based on the foregoing, we propose that sections 57-67 of the NSCA be repealed and replaced with provisions that include the following:

(a) Reduction of Capital Provision: This provision should be based on subsection 74(1) of the BCBCA, with the financial test in paragraph 74(1)(b) replaced with financial tests similar to those found in subsection 38(3) of the CBCA.

(b) Shareholder Liability: A provision similar to subsection 38(4) of the CBCA should be included in the NSCA amendments such that shareholders are liable for reductions made contrary to the NSCA.

> Under subsection 38(4) creditors can compel shareholders to repay or redeliver money or property paid or distributed as a reduction of capital.

There does not appear to be any reason to remove section 49 from the NSCA, although its usefulness in today's modern business climate is unknown. We suggest that the provision be amended to clarify what is meant by "memorandum" and whether court approval is required.

We recommend that a provision be added to the NSCA stating that a ULC may reduce its capital simply by passing a special resolution to that effect and expressly providing that court approval of the resolution is not required.

Additionally, we recommend that the uncertainty surrounding reductions of capital by way of redemption of shares for ULCs pursuant to subsections 51(5) and (6) be removed by changing "company" to "company limited by shares" in each of these provisions.

Please note that, as indicated above, amending sections 57-67 has ramifications for other provisions of the NSCA. For example, paragraphs 19(1)(g) and 26(4)(h) permit property in specie to be returned to the members of a company if done in accordance with the provisions of the NSCA dealing with reductions of capital. One of the issues that will need to be addressed in relation to these provisions is whether there are any policy reasons for preventing distribution of the property of a company without the sanction of the courts.

Appendix "A"

Companies Act (Nova Scotia) ("NSCA")
Sections 49, 51 and 57-67

Reduction of paid up capital

49 (1) When a company has accumulated a sum of undivided profits, which with the sanction of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount.

Effect of resolution

(2) The resolution shall not take effect until a memorandum showing the particulars required by this Act in the case of a reduction of share capital has been produced to and registered by the Registrar, but the other provisions of this Act with respect to reduction of share capital shall not apply to a reduction of paid-up capital under this Section.

Retention of reduction

(3) On a reduction of paid-up capital in pursuance of this Section any shareholder, or any one or more of several joint shareholders, may within one month after the passing of the resolution for the reduction, require the company to retain and the company shall retain accordingly, the whole of the money actually paid on the shares held by him either alone or jointly with any other person, which, in consequence of the reduction would otherwise be returned to him or them, and thereupon these shares shall, as regards the payment of dividend, be deemed to be paid up to the same extent only as the shares on which payment has been accepted by the shareholders in reduction of paid-up capital, and the company, shall invest and keep invested the money so retained in such securities authorized for investment by trustees as the company may determine, and on the money so invested or on so much thereof as from time to time exceeds the amount of calls subsequently made on the shares in respect of which it has been retained, the company shall pay the interest received from time to time on the securities.

Retained money represents calls

(4) The amount retained and invested shall be held to represent the calls which may be made to replace the share capital so reduced on those shares, whether the amount obtained on sale of the whole or such portion thereof as represents the amount of any call when made produces more or less than the amount of the call.

Calls on unpaid capital increase

(5) On a reduction of paid-up share capital in pursuance of this Section, the powers vested in the directors of making calls on shareholders in respect of the amount unpaid on their shares shall extend to the amount of the unpaid share capital as augmented by the reduction.

Reduction to be disclosed

(6) After any reduction of share capital under this Section, the company shall specify in the statements of account laid before any general meeting of the company the amount of undivided profits returned in reduction of paid-up share capital under this Section. R.S., c. 81, s. 49.

Alteration of memorandum

51 (1) A company limited by shares, if so authorized by its articles, may alter the conditions of its memorandum as follows, that is to say, it may

(a) increase its share capital by the creation of new shares of such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;

(d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) exchange shares of one denomination for another;

(f) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled;

(g) convert any part of its issued or unissued share capital into preference shares redeemable or purchasable by the company;

(h) provide for the issue of shares without any nominal or par value provided that upon any such issue a declaration executed by the secretary of the company must be filed with the Registrar stating the number of shares issued and the amount received therefor;

(i) except in the case of preferred shares, convert all or any of its previously authorized unissued or issued and fully paid-up shares, with nominal or par value into the same number of shares without any nominal or par value, and reduce, maintain or increase accordingly its liability on any of its shares so converted, provided however that the power to reduce its liability on any of its shares so converted where it results in a reduction of capital may only be exercised subject to confirmation by the court as provided by this Act;

(j) convert all or any of its previously authorized unissued or issued and fully paid-up shares without nominal or par value into the same or a different number of shares with nominal or par value, and for such purpose the shares issued without nominal or par value and replaced by shares with a nominal or par value shall be considered as fully paid, but their aggregate par value shall not exceed the value of the net assets of the company as represented by the shares without par value issued before the conversion.

Cancellation not reduction of capital

(4) Subject to subsection (12), a cancellation of shares in pursuance of this Section shall not be deemed to be a reduction of share capital within the meaning of this Act.

Cancellation and reduction

(12) Shares purchased, redeemed or acquired pursuant to subsection (5), (7) or (9) shall be cancelled and the authorized and issued capital is thereby decreased and the memorandum of association is amended accordingly, and Sections 57 to 67 do not apply in respect thereof.

Acquisition of preferred shares

(14) Notwithstanding subsections (5), (7) and (9), a company may redeem or purchase any preference shares which are, or at the option of the company are to be liable, to be redeemed or purchased by the company, provided that

(a) no such shares shall be redeemed or purchased by the company except out of profits of the company which would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase;

(b) no such shares shall be redeemed or purchased by the company unless they are fully paid;

(c) where any such shares are redeemed or purchased by the company otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividend, be transferred to a reserve fund, to be called "the capital redemption reserve fund", a sum equal to the amount applied in redeeming or purchasing the shares, and the provisions of this Act, including the provisions of this Section, relating to the reduction of the share capital of a company shall apply mutatis mutandis as if the capital redemption reserve fund were paid-up share capital of the company;

(d) where any such shares are redeemed or purchased by the company out of the proceeds of a fresh issue, the premium, if any, payable on redemption or purchases, must have been provided for out of the profits of the company before the shares are redeemed or purchased by the company.

Effect of subsection (14) acquisitions

(15) The redemption or purchase of preference shares under subsection (14) by a company shall not be taken as reducing the amount of a company's authorized share capital.

REDUCTION OF SHARE CAPITAL

Authorization by articles

57 (1) Subject to confirmation by the court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off, either by payment in cash or by distributing any of the companys property in specie, any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Name of special resolution

(2) A special resolution under this Section is in this Act referred to as "a special resolution for reducing share capital." R.S., c. 81, s. 57.

Confirmation orders

58 Where a company has passed and, where confirmation is required, confirmed a special resolution for reducing share capital, it may apply by petition to the court for an order confirming the reduction. R.S., c. 81, s. 58.

Effective provisions

59 (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital and in any other case if the court so directs, the following provisions shall have effect, subject nevertheless to subsection (2):

(a) every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

(b) the court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction;

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the court may direct, the following amount:

(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim,

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.

Discretion to allow reduction

(2) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the court may,

if having regard to any special circumstances of the case it thinks proper so to do, direct that subsection (1) shall not apply as regards any class or any classes of creditors. R.S., c. 81, s. 59.

Orders confirming terms of reductions

60 (1) The court, if satisfied with respect to every creditor of the company who under Section 59 is entitled to object to the reduction that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Discretion in orders

(2) Where the court makes any such order, it may

(a) if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as the last words thereof the words "and reduced"; and

(b) make an order requiring the company to publish as the court directs the reasons for reduction or such other information in regard thereto as the court may think expedient with a view to giving proper information to the public, and, if the court thinks fit, the causes which led to the reduction.

Words added to name

(3) Where a company is ordered to add to its name the words "and reduced" those words shall, until the expiration of the period specified in the order, be deemed to be part of the name of the company.

Registration of orders

61 (1) The Registrar, on the delivery to him of a copy of an order of the court certified by the prothonotary or clerk confirming the reduction of the share capital of a company and of a minute approved by the court showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided, and the amount of each share, and the amount, if any, at the date of the registration deemed to be paid up on each share, shall register the copy of the order and the minute.

Effective date of reduction

(2) On the registration, and not before, the resolution for reducing share capital, as confirmed by the order so registered, shall take effect.

Notice of registration

(3) Notice of the registration shall be published in such manner as the court may direct.

Certification of registration

(4) The Registrar shall certify under his hand the registration of the copy of the order and the minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with and that the share capital of the company is such as stated in the minute.

Minute part of memorandum

62 The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and must be embodied in every copy of the memorandum issued after its registration.

Liability for default

63 If a company makes default in complying with the requirements of Section 62 it shall be liable to a penalty not exceeding five dollars for each copy in respect of which default is made, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

Liability on calls

64 (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount paid, or, as the case may be, the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute, provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of any enactment with respect to winding up by the court, to pay the amount of his debt or claim, then

(a) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(b) if the company is wound up, the court, on the application of any such creditor, and proof of his ignorance as aforesaid may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in the winding up.

Rights of contributories

(2) Nothing in this Section shall affect the rights of the contributories among themselves.

Penalty for concealing creditors

65 If any director, manager or officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager or officer shall be liable to a penalty not exceeding five hundred dollars.

Publication orders

66 In any case of reduction of share capital, the court may require the company to publish as the court directs the reasons for reduction, or such other information in regard thereto as the court may think expedient with a view to giving proper information to the public, and, if the court thinks fit, the causes which led to the reduction.

Application

67 A company limited by guarantee and registered on or after the first day of August, 1935, may, if it has a share capital, and is so authorized by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

Appendix "B"

Canada Business Corporations Act ("CBCA")
Sections 38 and 39

38. (1) Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of

(a) extinguishing or reducing a liability in respect of an amount unpaid on any share;

(b) distributing to the holder of an issued share of any class or series of shares an amount not exceeding the stated capital of the class or series; and

(c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets

(2) A special resolution under this section shall specify the stated capital account or accounts from which the reduction of stated capital effected by the special resolution will be deducted.

(3) A corporation shall not reduce its stated capital for any purpose other than the purpose mentioned in paragraph (1)(c) if there are reasonable grounds for believing that

(a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(4) A creditor of a corporation is entitled to apply to a court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section; or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

(5) An action to enforce a liability imposed by this section may not be commenced after two years from the date of the act complained of.

(6) [Repealed, 2001, c. 14, s. 23] R.S., 1985, c. C-44, s. 38; 2001, c. 14, s. 23.

39. (3) A corporation shall adjust its stated capital account or accounts in accordance with any special resolution referred to in subsection 38(2).

Appendix "C"

Alberta Business Corporations Act ("ABCA")
Sections 38 and 39

Other reduction of stated capital

38 (1) Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, the purpose of

(a) extinguishing or reducing a liability in respect of an amount unpaid on any share,

(b) distributing to the holders of the issued shares of any class or series of shares an amount not exceeding the stated capital of the class or series, and

(c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets.

(2) A special resolution under this section shall specify the capital account or accounts from which the reduction of stated capital effected by the special resolution is to be deducted.

(3) A corporation shall not reduce its stated capital for any purpose, other than the purpose mentioned in subsection (1)(c), if there are reasonable grounds for believing that

(a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due, or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(4) A creditor of a corporation is entitled to apply to the Court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section, or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

(5) An action to enforce a liability imposed by this section may not be commenced after 2 years from the date of the action complained of.

(6) This section does not affect any liability that arises under section 118.

Adjustment of stated capital account

39 (3) A corporation shall adjust its stated capital account or accounts in accordance with a special resolution referred to in section 38(2).

Appendix "D"

British Columbia Business Corporations Act ("BCBCA")
Sections 74 and 75

Reduction of capital

74 (1) Subject to section 75 and subsection (2) of this section, a company may reduce its capital if it is authorized to do so

(a) by a court order, or

(b) if the capital is reduced to an amount that is not less than the realizable value of the company's assets less its liabilities, by a special resolution or court order.

(2) A resolution of a company under subsection (1) (b) to reduce capital does not take effect,

(a) if the company is a company registered under the Small Business Venture Capital Act, until the company has paid the money payable by it to the minister under section 22 of that Act, or

(b) if the company is a company registered under Part 2 of the Employee Investment Act, until the company has obtained confirmation from the minister that all of the money payable to the minister under sections 31 and 32 of that Act has been paid.

Exception to section 74

75 A company may, on the terms, if any, and in the manner, if any, provided in its memorandum or articles, do any of the following without obtaining the special resolution or court order referred to in section 74 (1) and without changing its authorized share structure:

(a) redeem or purchase shares under section 77 or 227 (3) (g) or under Division 2 of Part 8;

(b) accept a surrender of shares by way of gift or for cancellation;

(c) convert fractional shares into whole shares in accordance with section 83

(i) on a subdivision or consolidation of shares under section 54 (4), or

(ii) on a redemption, purchase or surrender referred to in paragraph (a) or (b) of this section.

Appendix "E"

New Brunswick Business Corporations Act ("NBBCA")
Sections 35 and 36

35 (1) Subject to subsection (3), a corporation may by special resolution reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of

(a) extinguishing or reducing a liability in respect of an amount unpaid on any share issued before a corporation is continued,

(b) distributing to the holder of an issued share of any class or series of shares an amount not exceeding the stated capital of the class or series, and

(c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets.

35 (2) A special resolution under this section shall specify the stated capital account or accounts from which the reduction of stated capital effected by the special resolution will be deducted.

35 (3) A corporation shall not reduce its stated capital under paragraph (1)(a) if there are reasonable grounds for believing that

(a) the corporation is, or would after the reduction, be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

35 (4) A creditor of a corporation is entitled to apply to the Court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section, or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

35 (5) An action to enforce a liability imposed by this section may not be commenced after two years from the date of the action complained of.

35 (6) This section does not affect any liability that arises under section 76.

36 (3) A corporation shall adjust its stated capital account or accounts in accordance with any special resolution referred to in subsection 35(2).

Appendix "F"

Newfoundland and Labrador Corporations Act ("NLCA")
Sections 67 and 68

Reduction of stated capital

67. (1) A corporation may by special resolution reduce its stated capital by

(a) extinguishing or reducing a liability in respect of an amount unpaid on a share;

(b) returning an amount in respect of consideration the corporation received for an issued share, whether or not the corporation purchases, redeems or otherwise acquires a share or fraction of a share it issued; and

(c) declaring its stated capital to be reduced by an amount that is not represented by realizable assets.

(2) A special resolution under this section shall specify the stated capital account from which the reduction of stated capital effected by the special resolution will be deducted.

(3) Notwithstanding subsection (1), a corporation shall not reduce its stated capital under paragraph (1)(a) or (b) where there are reasonable grounds for believing that

(a) the corporation is, or would after the reduction be, unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would as a result be less than the aggregate of its liabilities.

(4) A creditor of a corporation is entitled to apply to a court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to a liability of the shareholder that was extinguished or reduced contrary to this section; or

(b) to pay or deliver to the corporation money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

(5) An action to enforce a liability imposed by this section may not be started after 2 years from the date of the act complained of.

(6) This section does not affect liability that arises under section 192 or 193.

Stated capital account adjustment

68. (3) A corporation shall adjust its stated capital account in accordance with a special resolution referred to in subsection 67(2).

Appendix "G"

Ontario Business Corporations Act ("OBCA")
Sections 34, 35 and 130

Reduction of liability re unpaid share: stated capital

34. (1) Subject to subsection (4), a corporation may by special resolution,

(a) extinguish or reduce a liability in respect of an amount unpaid on any share; or

(b) reduce its stated capital for any purpose including, without limiting the generality of the foregoing, for the purpose of,

(i) distributing to the holders of issued shares of any class or series of shares an amount not exceeding the stated capital of the class or series, or

(ii) declaring its stated capital to be reduced by,

(A) an amount that is not represented by realizable assets, or

(B) an amount otherwise determined in respect of which no amount is to be distributed to holders of issued shares of the corporation. R.S.O. 1990, c. B.16, s. 34 (1).

Right to vote where reduction under subs. (1)

(2) Where a class or series of shares of a corporation would be affected by a reduction of stated capital under clause (1) (b) in a manner different from the manner in which any other class or series of shares of the corporation would be affected by such action, the holders of the differently affected class or series of shares are entitled to vote separately as a class or series, as the case may be, on the proposal to take the action, whether or not the shares otherwise carry the right to vote. R.S.O. 1990, c. B.16, s. 34 (2).

Account to be reduced specified

(3) A special resolution under this section shall specify the stated capital account or accounts from which the reduction of stated capital effected by the special resolution will be made. R.S.O. 1990, c. B.16, s. 34 (3).

Restriction on reduction

(4) A corporation shall not take any action to extinguish or reduce a liability in respect of an amount unpaid on a share or to reduce its stated capital for any purpose other than the purpose mentioned in sub-subclause (1) (b) (ii) (A) if there are reasonable grounds for believing that,

(a) the corporation is or, after the taking of such action, would be unable to pay its liabilities as they become due; or

(b) after the taking of such action, the realizable value of the corporation's assets would be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 34 (4).

Application for order where improper reduction

(5) A creditor of a corporation is entitled to apply to the court for an order compelling a shareholder or other recipient,

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section; or

(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section.

(6) Repealed: 2002, c. 24, Sched. B, s. 25.

Class action

(7) Where it appears that there are numerous shareholders who may be liable under this section, the court may permit an action to be brought against one or more of them as representatives of the class and, if the plaintiff establishes a claim as creditor, may make an order of reference and add as parties in the referee's office all such shareholders as may be found, and the referee shall determine the amount that each should contribute towards the plaintiff's claim, which amount may not, in the case of any particular shareholder, exceed the amount referred to in subsection (5), and the referee may direct payment of the sums so determined.

Shareholder holding shares in fiduciary capacity

(8) No person holding shares in the capacity of a personal representative and registered on the records of the corporation as a shareholder and therein described as the personal representative of a named person is personally liable under this section, but the person named is subject to all liabilities imposed by this section.

s. 130 does not apply

(9) This section does not affect any liability that arises under section 130.

Adjustment in stated capital account

35. (3) A corporation shall adjust its stated capital account or accounts in accordance with any special resolution referred to in subsection 34 (3).

Liability of directors

130. (1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share for a consideration other than money contrary to section 23 are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

Idem

(2) Directors of a corporation who vote for or consent to a resolution authorizing,

(a) any financial assistance contrary to section 20;

(b) a purchase, redemption or other acquisition of shares contrary to section 30, 31 or 32;

(c) a commission contrary to section 37;

(d) a payment of a dividend contrary to section 38;

(e) a payment of an indemnity contrary to section 136; or

(f) a payment to a shareholder contrary to section 185 or 248,

are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

Joint liability

(3) A director who has satisfied a judgment rendered under this section is entitled to contribution from the other directors who voted for or consented to the unlawful act upon which the judgment was founded.

Application to court

(4) A director liable under subsection (2) is entitled to apply to the court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 20, 30, 31, 32, 37, 38, 136, 185 or 248.

What court may order

(5) In connection with an application under subsection (4), the court may, if it is satisfied that it is equitable to do so,

(a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 20, 30, 31, 32, 37, 38, 136, 185 or 248;

(b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; or

(c) make any further order it thinks fit.

Exception to subs. (1)

(6) A director is not liable under subsection (1) if the director proves that he or she did not know and could not reasonably have known that the share was issued for a consideration less than the fair equivalent of the money that the corporation would have received if the share had been issued for money. R.S.O. 1990, c. B.16, s. 130 (6).

(7) Repealed: 2002, c. 24, Sched. B, s. 25.

Appendix "H"

Quebec Companies Act ("QCA")
Sections 58-65 and 123.62–123.65

Reduction of capital

58. A company may by by-law reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may,

(1) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(2) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(3) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

And may reduce the amount of its share capital and of its shares accordingly.

Objections by creditors

59. (1) Where the proposed reduction of share capital involves either extinction or diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the enterprise registrar so directs, every creditor of the company who at the date of the petition for supplementary letters patent is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

List of creditors

(2) The enterprise registrar shall settle a list of creditors so entitled to object, and for that purpose shall ascertain the names of such creditors and the nature and amount of their debts or claims. He may thereupon publish notices fixing a period within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

Payment of creditor

(3) Where a creditor entered on the list does not consent to the reduction, the enterprise registrar may, if he thinks fit, dispense with the consent of that creditor, on the company paying to the creditor his debt or claim in one of the ways hereafter mentioned, as the enterprise registrar may direct, to wit:

(a) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to pay it, then the full amount of the debt or claim;

(b) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, than an amount fixed by the enterprise registrar after the like inquiry and adjudication as if the company were being wound up.

Shareholders' liability

60. (1) A shareholder of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount paid, or, as the case may be, the reduced amount, if any, which is to be deemed to have been paid, on the share, and the amount of the share as fixed by the supplementary letters patent.

Shareholders' liability

Provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions respecting the winding-up of companies, to pay the amount of his debt, or claim, then:

(a) Every person who was a shareholder of the company at the date of the supplementary letters patent shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the date of the supplementary letters patents, and

(b) If the company is wound up, the court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding-up.

Restriction

(2) Nothing in this section shall affect the rights of the contributories among themselves, nor the recourse of any creditor against the company or the shareholders.

Concealing creditor's name. Penalty

61. Any director, manager or officer of the company who

(a) wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor; or who

(b) aids or abets in any such concealment or misrepresentation,

shall be guilty of an indictable offence and liable to a fine of not more than $200.

Publication

62. The enterprise registrar may require the company to publish, as he directs, the reasons for reduction, or such other information in regard thereto as he may think expedient with a view to giving proper information to the public.

Approval of by-law

63. No by-law enacting one of the operations contemplated by the provisions of sections 55, 57 and 58 of this act shall have any force or effect before it has been approved by the vote of at least two-thirds in value of the shares represented by the shareholders present at a special general meeting of the company, and afterwards confirmed by supplementary letters patent.

Application

64. (1) The application for supplementary letters patent to confirm the by-law must be made by the directors not more than six months after the approval of the by-law by the shareholders.

Proof

(2) The directors shall, with such application, produce a copy of such by-law, under the seal of the company, and signed by the president or vice-president and the secretary, and establish, to the satisfaction of the enterprise registrar, the due passage and approval of such by-law, and the expediency and bona fide character of the operation or operations thereby provided for.

Evidence

(3) The enterprise registrar shall, for that purpose, take and keep on record any requisite evidence in writing, given under oath.

Supp. letters patent

65. Upon proof of the passing and approval of the by-law, the enterprise registrar may grant such supplementary letters patent, which he shall deposit in the register; and thereupon, from the date of the supplementary letters patent, the capital stock of the company shall be and remain changed to the amount, in the manner and subject to the conditions set forth by such by-law; and the whole of the stock, as so increased or reduced, shall become subject to the provisions of this Part, in like manner as if every part thereof had been or formed part of the stock of the company originally subscribed.

DIVISION II

INCREASES AND REDUCTIONS OF THE SHARE CAPITAL

Increase

123.61. A company may increase the amount of its issued and paid-up share capital only if a by-law to that effect is adopted by the company, except where the increase is a result of the payment of shares.

Reduction

123.62. A company may also reduce the amount of its issued share capital, in particular to limit or remove the shareholder's obligation to pay for the shares issued, or to reimburse any portion of the share capital exceeding its needs to the shareholders, if a by-law to that effect is adopted by the company.

Exception

123.63. A company may in no case reduce the amount of its issued share capital if there is reasonable ground to believe that, as a consequence,

(1) it could not discharge its liabilities when due, or

(2) the book value of its assets would, after the reduction, be less than the sum of its liabilities and its issued and paid-up share capital account.

Liability

123.64. Directors who authorize a reduction of share capital in contravention of section 123.63 are solidarily liable for the sums or property accounting for the unlawful reduction.

Ratification

123.65. The by-law to increase or to reduce the share capital must be confirmed by the vote of two-thirds of the shareholders present at a special general meeting called for that purpose.

5. THE ROLE OF THE COURT IN RESTORING STRUCK-OFF COMPANIES

A. INTRODUCTION

As in other aspects of companies law discussed previously in this paper, the NSCA requires the court's approval to restore struck-off companies to the register. The purpose of this chapter is to review the relevant portions of the NSCA in comparison to equivalent provisions in other Canadian jurisdictions and to determine whether it would be appropriate to amend the NSCA to reduce the court's involvement in this area.

B. RESTORATION OF STRUCK-OFF COMPANIES

NOVA SCOTIA

Subsection 136(4) of the NSCA provides a means for having the name of a struck-off company restored on the register, which involves an application to the court for approval:

> 136 (4) If any company or member or creditor thereof feels aggrieved by the name of the company having been struck off the register in pursuance of this Section, the company or member or creditor may apply to the court, and the court, if satisfied that the company was, at the time of the striking off, carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored on the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off, and the court may by the order give such directions and make such provisions as seem just for placing the company and all persons in the same position, as nearly as may be, as if the name of the company had never been struck off.

A company may be struck off the register of companies either by the Registrar or on application by the company itself, as provided for in subsections 136(2)(3) and 137(1):

> (6) The Registrar may strike off the register of companies the name of any company
>
>> (a) deemed to be dissolved under subsection (1) of Section 67 of the Companies Winding Up Act;

(b) against whom a final order winding up the company has been made either under the Winding-up Act (Canada) or the Companies Winding Up Act; or

(c) that pursuant to Section 134 was an amalgamating company and was amalgamated with one or more other companies. R.S., c. 81, s. 136; 1990, c. 15, s. 18; 1999, c. 4, s. 2.

137 (1) The certificate of incorporation of a company and certificate of change of name, when applicable, may be surrendered and the name of the company struck off the companies register if the company proves to the satisfaction of the Registrar that

(a) it has no assets and that any assets owned by it immediately prior to the application for leave to surrender its certificate of incorporation have been divided rateably amongst its shareholders or members;

(b) either

(i) it has no debts, liabilities or other obligations, or

(ii) the debts, liabilities or other obligations of the company have been duly provided for or protected, or that the creditors of the company or other persons having interests in such debts, liabilities or other obligations consent; and

(c) the company has given notice of the application for leave to surrender by publishing the same once in the Royal Gazette and once in a newspaper published at or as near as may be to the place where the company has its registered office not earlier than two months and not later than two weeks before the date of the application.

OTHER JURISDICTIONS

No other jurisdiction in Canada requires court approval for the restoration of a struck-off corporation to the equivalent of the company's register in Nova Scotia. The CBCA, the OBCA, the NBBCA, the NLCA, the PEICA, the ABCA, the SBCA, the MCA, the YBCA and the NTBCA allow the restoration of a corporation on application to the director or registrar under the governing legislation.[20]

As in many other areas, the BCBCA has a hybrid approach to the restoration of companies which have been removed from the register. An application for restoration may be made either to the registrar or to the court, with the registrar's approval. For ease of reference, the relevant provisions of the BCBCA are attached hereto as Appendix "A". The BCBCA provides an extensive set of guidelines and requirements for an application for restoration, and allows both full restoration and limited restoration (restoration for a limited period).

It is to be noted that under Section 246 of the CBCA, a person who feels aggrieved by a decision of the director under that statute to revive a corporation may appeal the decision to the court. That section allows for a review by the court of a number of decisions which the director may make, including an order for the revival of a company pursuant to the provisions of Section 209 of the CBCA.

In general, the other Canadian jurisdictions allow restoration of a company which has been struck off the register by a relatively simple procedure of an application to the registrar or director with supporting documentation, upon receipt of which the registrar or director either may or must reinstate the registration of the company.

C. DISCUSSION

We have not found any discussion of the historical reasons for requiring the court's participation under the NSCA in the restoration of a company which has been struck off the register. The approach in the majority of other Canadian jurisdictions is to make restoration as simple and efficient as possible. There is no apparent reason why this should not also be the case in Nova Scotia. Allowing restoration through application to the Registrar would simplify the process and bring Nova Scotia in line with most of the rest of the Canadian jurisdictions.

The BCBCA also permits the restoration of the registration of an extra-provincial corporation to be effected by the registrar. In Nova Scotia, an extra-provincial corporation may cease to be registered under the Corporations Registration Act for failure to pay the annual fee. Subsection 17(1) of that statute reads as follows:

---

[20] See CBCA, s.209; OBCA, s.241(5); NBBCA, s. 201(3); NLCA, s. 448(1); PEICA, s. 73(1); ABCA, s. 285(3); SBCA s. 290(5); MCA s. 194; YBCA s. 282(3); and NTBCA s. 295.

> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature.

On occasion, there are situations where an action is commenced by an extra-provincial corporation not realizing that its certificate of registration had been revoked for non-payment of fees. It may result in the legal action being discontinued and a new action commenced after the re-registration of the corporation. We do not see any reason why the Registrar should not be permitted to restore the registration of an extra-provincial corporation as well as to restore a company which has been struck off from the register of companies under the Companies Act.

D. RECOMMENDATION

Given the foregoing, we recommend that Section 136(4) of the NSCA be amended to allow an application for restoration to be made to the Registrar. Such an application should be available to any interested person who should provide to the Registrar such information and documents as the Registrar may determine. It would of course be necessary to expressly provide that upon restoration the company would continue as if it had never been struck off, with the same proviso as found in Section 136(4)(a), which protects those who may have acquired from the Province assets which escheated to the Province upon the initial dissolution.

Consideration should also be given to amending the Corporations Registration Act to include provisions similar to that found in the BCBCA permitting the Registrar to restore the registration of an extra-provincial company which has had its registration under the Act revoked. Such an amendment should also provide that when the extra-provincial company complies with conditions set by the Registrar, the certificate is deemed not to have been revoked.

In the event the above recommendations are adopted, there should be a right of any aggrieved person to have the decision of the Registrar reviewed by the court. The court should also have the power to review other decisions, including a decision of the Registrar to restore a company under the NSCA.

Appendix "A"

British Columbia Business Corporations Act ("BCBCA")
Division 11

354 (1) In this Division:

"full restoration" means a restoration of a company, or a restoration of the registration of a foreign entity as an extraprovincial company, that is not a limited restoration;

"limited restoration" means a restoration of a company, or a restoration of the registration of a foreign entity as an extraprovincial company, that is for a limited period under section 359 (1) or 361 (1).

(2) In this Division, a person is related

(a) to a company that has been dissolved, if

(i) the person was, at the time of the dissolution, a director, officer or shareholder of the company,

(ii) the person is the heir or personal or other legal representative of a person who was, at the time of the dissolution, a shareholder of the company, or

(iii) in the case of an application under section 360 (2) (a) or 361 (2) (a), the person is a person referred to in subparagraph (i) or (ii), as the case may be, or is ordered by the court to be an appropriate person to make the application, or

(b) to a foreign entity that has had its registration as an extraprovincial company cancelled, if, at the time an application is made under this Division for the restoration of that registration or for the conversion of a limited restoration of the registration to a full restoration, the person is,

(i) in the case of a limited liability company, the limited liability company or a manager or member of the limited liability company,

(ii) in the case of any other foreign entity, the foreign entity or a director, officer or shareholder of the foreign entity, or

(iii) in the case of an application under section 360 (2) (a) or 361 (2) (a), the person is a person referred to in subparagraph (i) or (ii), as the case may be, or is ordered by the court to be an appropriate person to make the application.

Pre-requisites to application

355 (1) If, for any reason, a company has been dissolved or the registration of a foreign entity as an extraprovincial company has been cancelled, an application for restoration under this Division may be made to the registrar or to the court.

(2) Before submitting an application to the registrar for filing under section 356 or before making an application to the court under section 360, the applicant must

(a) publish in the Gazette notice of the application,

(b) mail notice of the application as follows:

(i) in the case of a restoration of a company, to the last address shown in the corporate register as the address or mailing address, as the case may be, of the registered office of the company;

(ii) in the case of a restoration of a foreign entity's registration as an extraprovincial company, to the last address shown in the corporate register as the address or mailing address, as the case may be, for an attorney for the extraprovincial company or, if none, to the address inside British Columbia that was the last address shown in the corporate register as the address or mailing address, as the case may be, for its head office, and

(c) reserve a name or an assumed name under section 22 or 26, as the case may be, for the company or foreign entity unless

(i) the company is to be restored with the name created by adding "B.C. Ltd." after the incorporation number of the company, or

(ii) the foreign entity is a federal corporation.

Applications to the registrar for restoration

356 (1) A person may apply to the registrar to restore a company or to restore the registration of a foreign entity as an extraprovincial company.

(2) An application may be made under subsection (1)

(a) for a full restoration, by a related person, or

(b) for a limited restoration, by any person.

(3) In order to apply for restoration under this section, an applicant must provide to the registrar the records and information the registrar may require and must submit to the registrar for filing

(a) a restoration application in the form established by the registrar, and

(b) any other records the registrar may require.

(4) An application to the registrar under subsection (1)

(a) must, if the dissolution of the company or the cancellation of the registration of the foreign entity occurred before the coming into force of this Act, be made within 10 years after the dissolution or cancellation, or

(b) may, in any other case, be made at any time.

Contents of application to the registrar for restoration

357 (1) A restoration application under section 356 must contain the following:

(a) the date on which the notice required under section 355 (2) (a) was published in the Gazette;

(b) the date on which the notice required under section 355 (2) (b) was mailed in accordance with that subsection;

(c) the information required under subsection (2) or (3) of this section, as the case may be.

(2) If the application under section 356 is for the restoration of a company, the restoration application must contain

(a) the name reserved for the company and the reservation number given for it, or a statement that the name by which the company is to be restored is the name created by adding "B.C. Ltd." after the incorporation number of the company,

(b) any translation of the company's name, set out in the prescribed manner, that the company intends to use outside Canada, and

(c) if the application is for a full restoration of the company,

(i) a statement that the applicant is related to the company and the nature of the person's relationship with the company,

(ii) the mailing address and the delivery address of the office proposed as the registered office of the restored company, and

(iii) for the records office of the restored company, the mailing address and the delivery address of the office at which the dissolved company's records, within the meaning of section 351, are being kept or, if those records are not available, a statement to that effect and the mailing address and the delivery address of the office proposed as the records office of the restored company.

(3) If the application under section 356 is for the restoration of the registration of a foreign entity as an extraprovincial company, the restoration application must contain

(a) the name or assumed name, as the case may be, reserved for the foreign entity and the reservation number given for it, or, in the case of a federal corporation, the name of that corporation, and

(b) if the application is for a full restoration of the registration of a foreign entity as an extraprovincial company,

(i) a statement that the applicant is related to the foreign entity and the nature of the person's relationship with the foreign entity,

(ii) the mailing address and the delivery address for the office that the foreign entity will have as its head office after its registration as an extraprovincial company is restored, whether or not that head office is in British Columbia, and

(iii) for each of the attorneys, if any, that the foreign entity will have after its registration as an extraprovincial company is restored, a mailing address and a delivery address that complies with section 386 (3).

Registrar must restore

358 (1) Subject to section 363, unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, after a restoration application under section 356 is filed with the registrar, the registrar must, on any terms and conditions the registrar considers appropriate, restore the company or restore the registration of the foreign entity as an extraprovincial company.

(2) Subject to section 368, unless the court orders otherwise, a restoration under subsection (1) of this section is without prejudice to the rights acquired by persons before the restoration.

Limited restoration by registrar

359 (1) Subject to section 361 (2) and subsection (2) of this section, if a restoration under section 358 is for a limited period, the restored company is dissolved or the restored registration of the foreign entity as an extraprovincial company is cancelled on the expiration of the limited period of restoration.

(2) If a restoration under section 358 is a limited restoration, the registrar may, on an application filed with the registrar within the limited period of restoration,

(a) if the application is made by a related person, convert the limited restoration into a full restoration, or

(b) on an application made by any person, extend the period to any later date that the registrar considers appropriate, in which case the restored company is dissolved or the restored registration of the foreign entity as an extraprovincial company is cancelled on the expiration of the extended period.

(3) An applicant under subsection (2) (a) of this section must comply with sections 355 (2) (a) and (b), 356 (3), 357 (1) (a) and (b) and 357 (2) (c) or (3) (b).

(4) After a company is dissolved under this section, or the registration of the foreign entity as an extraprovincial company is cancelled under this section, the registrar must publish in the prescribed manner notice that the company has been dissolved or the registration has been cancelled.

Applications to the court for restoration

360 (1) A person may apply to the court to restore a company or to restore the registration of a foreign entity as an extraprovincial company.

(2) An application may be made under subsection (1)

(a) for a full restoration, by a related person, or

(b) for a limited restoration, by any person.

(3) An applicant must

(a) provide to the registrar notice of the application and a copy of any record filed in the court registry in support of it, and

(b) obtain the registrar's consent to the restoration.

(4) On an application under subsection (1), the applicant must provide to the court

(a) the information required under section 357,

(b) the registrar's consent to the restoration, including any terms and conditions that the registrar considers appropriate, and

(c) any other information and records required by the court.

(5) Subject to subsection (8) of this section, on an application under subsection (1), the court may, if it is satisfied that it is appropriate to restore the company or to restore the registration of the foreign entity as an extraprovincial company, make an order, on the terms and conditions, if any, the court considers appropriate, that the company be restored or that the registration of the foreign entity as an extraprovincial company be restored.

(6) Without limiting subsection (5), in an order made under that subsection, the court may give directions and make provisions it considers appropriate for placing the company or extraprovincial company and every other person in the same position, as nearly as may be, as if the company had not been dissolved or the registration of the foreign entity as an extraprovincial company had not been cancelled.

(7) Subject to section 368, unless the court orders otherwise, an order under subsection (5) of this section is without prejudice to the rights acquired by persons before the restoration.

(8) An order under subsection (5) must reflect any terms and conditions referred to in subsection (4) (b).

Limited restoration by court

361 (1) Subject to subsection (2), if a restoration ordered by the court under section 360 (5) is for a limited period, the restored company is dissolved or the restored registration of the foreign entity as an extraprovincial company is cancelled on the expiration of the limited period of restoration.

(2) If a restoration under section 358 or 360 (5) is a limited restoration, the court may, on an application made in accordance with this section within the limited period of restoration,

(a) if the application is made by a related person, convert the limited restoration into a full restoration, or

(b) on an application made by any person, extend the period to any later date that the court considers appropriate, in which case the restored company is dissolved or the restored registration of the foreign entity as an extraprovincial company is cancelled on the expiration of the extended period.

(3) An applicant under subsection (2) (a) of this section must

(a) comply with section 355 (2) (a) and (b),

(b) provide to the registrar notice of the application and a copy of any record filed in the court registry in support,

(c) obtain the registrar's consent to the conversion, and

(d) provide to the court

(i) the information required under sections 357 (1) (a) and (b) and 357 (2) (c) or (3) (b),

(ii) the registrar's consent to the conversion, including any terms and conditions that the registrar considers appropriate, and

(iii) any other information and records required by the court.

(4) After a company is dissolved under this section, or the registration of the foreign entity as an extraprovincial company is cancelled under this section, the registrar must publish in the prescribed manner notice that the company has been dissolved or the registration has been cancelled.

Filing of restoration application with the registrar

362 (1) Promptly after an order is made under section 360 or 361, the applicant must provide to the registrar the records and information the registrar may require and must file with the registrar

(a) a restoration application in the form established by the registrar, containing a statement that a copy of an entered court order has been obtained under section 360 (5) or 361 (2) (a) or (b), as the case may be, and

(b) any other records the registrar may require.

(2) Subject to section 363 (2) and (3), unless the court orders otherwise in an entered order of which a copy has been filed with the registrar, the registrar, after a restoration application is filed with the registrar under subsection (1) (a) of this section, must do whichever of the following is applicable:

(a) restore the company or restore the registration of the foreign entity as an extraprovincial company;

(b) extend the restoration;

(c) convert the limited restoration into a full restoration.

Restrictions on restoration

363 (1) If a restoration is as a result of an application to the registrar under section 356, the registrar must not restore the company, or restore the registration of the foreign entity as an extraprovincial company, as the case may be, until 21 days after the later of

(a) the date shown in the restoration application as the date on which notice of the application was published in the Gazette in accordance with section 355 (2) (a), and

(b) the date shown in the restoration application as the date on which the applicant mailed the notice of the application in accordance with section 355 (2) (b).

(2) The registrar must not, under section 358 (1) or 362 (2), restore the registration of a foreign entity as an extraprovincial company unless the reservation of the name or assumed name included in the restoration application remains in effect at the date of the restoration.

(3) Subsection (2) of this section does not apply to a federal corporation.

Effect of restoration of company

364 (1) A company is restored under section 358 (1) or 362 (2) when the registrar alters the

corporate register to reflect that restoration and, whether or not the requirements precedent and incidental to restoration have been complied with, a notation in the corporate register that a company has been restored is conclusive evidence for the purposes of this Act and for all other purposes that the company has been duly restored as of the date shown and the time, if any, shown in the corporate register.

(2) Unless the court orders otherwise, if there is a full restoration of a company,

(a) subject to section 366 (1), subsection (3) of this section and paragraph (b) of this subsection, the company is restored with the articles and with the notice of articles or memorandum, as the case may be, that it had immediately before its dissolution, but if the information included in the restoration application differs from the information contained in those articles or that notice of articles or memorandum, those articles or that notice of articles or memorandum is deemed, on the restoration, to be altered to reflect the new information, and

(b) the mailing addresses and delivery addresses of the registered office and records office for the company are the mailing addresses and delivery addresses respectively shown for them on the restoration application.

(3) Despite any other provision of this Division, sections 433 and 434 apply to a restored company if

(a) the company was, immediately before its dissolution, a reporting company within the meaning of the Company Act, 1996, other than a reporting issuer, a reporting issuer equivalent or a company within a prescribed class of corporations, and was dissolved before the coming into force of this Act, or

(b) the company was a pre-existing reporting company that had not, before its dissolution, complied with section 370 (1) (a) and (b) or 436 (1) (a) and (b).

(3.1) Despite any other provision of this Division, section 442.1 applies to a restored company if the company was, immediately before its dissolution, a pre-existing company that had not, before its dissolution, complied with section 370 (1) (a) and (b) or 436 (1) (a) and (b).

(4) A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved.

Effect of restoration of extraprovincial company

365 (1) The registration of a foreign entity as an extraprovincial company is restored when the registrar alters the corporate register to reflect the restoration and, whether or not the requirements precedent and incidental to restoration have been complied with, a notation in the corporate register that the registration of the foreign entity as an extraprovincial company has been restored is conclusive evidence for the purposes of this Act and for all other purposes that the registration of the foreign entity as an extraprovincial company has been duly restored as of the date shown and the time, if any, shown in the corporate register.

(2) If the registration of a foreign entity as an extraprovincial company is restored by a full restoration, the mailing addresses and the delivery addresses of the head office of the extraprovincial company, whether or not the head office is in British Columbia, and of the attorneys, if any, for the extraprovincial company are the mailing addresses and the delivery addresses respectively shown for them on the restoration application.

(3) If a foreign entity has its registration as an extraprovincial company restored, the registration is deemed not to have been cancelled, and proceedings may be taken as might have been taken if that registration had not been cancelled.

Name on restoration

366 (1) A company that is restored has as its name on its restoration,

(a) the name shown for the company on the restoration application if a reservation of that name remains in effect at the date of the restoration, or

(b) in any other case, the name created by adding "B.C. Ltd." after the incorporation number of the company.

(2) Subject to section 363 (2), if the registration of a foreign entity as an extraprovincial company is restored under this Division, the name under which the foreign entity is registered as an extraprovincial company is the name that is included in the restoration application.

Registrar's duties after restoration

367 (1) After the restoration of a company, the restoration of the registration of a foreign entity as an extraprovincial company under this Division or the extension or conversion under section 359 or 361 of a limited restoration, the registrar must

(a) publish in the prescribed manner

(i) notice of the restoration, extension or conversion, and

(ii) notice of the date on which any limited period of restoration expires,

(b) issue a certificate of restoration in accordance with subsection (2) of this section and furnish

(i) the certificate to the company or extraprovincial company, as the case may be, and

(ii) a copy of the certificate to the applicant,

(c) if requested to do so, furnish a certified copy of the restoration application to the company or extraprovincial company, and

(d) if requested to do so, furnish to the company a certified copy of the notice of articles, if any.

(2) A certificate of restoration must show the name of the company or, in the case of an extraprovincial company, the name and any assumed name for the extraprovincial company, the date and time of the restoration, and,

(a) in the case of a limited restoration or the extension of a limited restoration, include the date on which the limited period of restoration expires, or

(b) in the case of a conversion of a limited restoration to a full restoration, include the date and time of the conversion.

Corporate assets to be returned to restored company

368 (1) If money or other assets of a company vested in the government as a result of the dissolution of the company, on the restoration of the company,

(a) any of the assets that vested in the government and that have not been disposed of by the government vest in the company without any deed, bill of sale or other record from the government or any action by the government, and

(b) the government must, subject to subsections (3) to (5),

(i) in the case of assets that remain in the government's custody, return each of those assets to the company,

(ii) in the case of assets that have been disposed of by the government, pay to the company, out of the consolidated revenue fund, the amount of money realized by the government from the disposition of those assets, and

(iii) in the case of money vested in the government that has been received by the government, pay to the company, out of the consolidated revenue fund, the amount of that money.

(2) A payment under subsection (1) (b) may be made without any appropriation other than this Act.

(3) The government need not comply with subsection (1) (b) in relation to money or other assets paid or provided by the minister under section 349.

(4) The government need not comply with subsection (1) (b) unless and until it has been reimbursed, out of the money or other assets or otherwise, for its costs of

(a) obtaining, retaining, maintaining and disposing of the money and other assets, and

(b) paying the money, and returning the other assets, in accordance with that subsection.

(5) Title to, or any interest in, land that has escheated to the government under section 4 of the Escheat Act is not, except as provided in section 4 of that Act, affected by a restoration of a company.

6. THE ROLE OF THE COURT IN THE ALTERATION OF THE MEMORANDUM OF ASSOCIATION OF A COMPANY

A. NOVA SCOTIA

A Nova Scotia company may not alter its memorandum except as provided for in the NSCA (section 14). Section 19 of the NSCA lists the circumstances when a company may, by special resolution, alter its memorandum. Such alteration must be approved by a court except where the company wishes to change to a company which has the capacity, rights, powers and privileges of a natural person. For ease of reference, the relevant provisions of the NSCA are set out in Appendix "A" hereto.

B. OTHER JURISDICTIONS

The NBBCA, the NLCA, the ABCA, the SBCA, the YBCA, the NTBCA, and the CBCA allow an alteration of a corporation's articles of incorporation by special resolution.[21] The MCA allows an amendment to a corporation's articles of incorporation by way of special resolution or resolution, depending on the nature of the change: changes to a corporation's share capital require only a resolution (see subsections. 167(1) and (2)); for ease of reference these provisions are attached hereto as Appendix "B".

Under the OBCA, the articles of incorporation may be amended either by special resolution or by resolution of the directors of a corporation, depending on the nature of the amendment (see section 168). Under the QCA, a company's articles may be amended by the directors passing a bylaw which is subsequently confirmed by two-thirds of the shareholders (see sections 123.101 and 123.103).

C. JURISDICTIONS OUTSIDE CANADA

Under the UKCA, a company may alter the object clauses of the memorandum by special resolution. Court approval is only required if minority shareholders make an application to the court for review:

> 4 (1) A company may by special resolution alter its memorandum with respect to the statement of the company's objects.
>
> (2) If an application is made under the following section, an alteration does not have effect except in so far as it is confirmed by the court.

---

[21] See NBBCA s. 113; NLCA s. 279; ABCA s. 173; SBCA s. 167; YBCA s. 175(1); NTBCA s. 176(1); and CBCA s. 173.

Under the Delaware Code, Title 8, Chapter 1, a corporation may amend its certificate of incorporation (the equivalent of the memorandum of association) before receipt of payment for stock, and an amendment must be adopted by a majority of the incorporators, or by a majority of the directors, where directors were named in the original certificate of incorporation or have been elected and have qualified (see section 241). Similarly, under the New York State Consolidated Laws, Business Corporation, Article 8, a corporation may amend its certificate of incorporation from time to time, if the amendment contains only such provisions as might be lawfully contained in an original certificate of incorporation filed at the time of making such amendment, and the amendment may be authorized by a vote of the board, followed by a majority vote of shareholders (see sections 801 and 803). Under the Florida Statutes, xxxvi, Chapter 607, the board of directors of a corporation or its shareholders may amend its articles of incorporation, depending on the nature of the amendment (see sections 607.1001, 607.1002 and 607.1003).

D. DISCUSSION

We have not found any discussion of the historic reasons for which the court's approval is required for alterations to a company's memorandum of association under the NSCA. The NSCA appears to have simply adopted the provisions in the UKCA.

None of the alterations contemplated under section 19 constitutes a fundamental change to the company such that the interests of shareholders would be endangered. Paragraph 19(1)(i) allows a company to alter the provisions of its memorandum to enable it to amalgamate with any other company or body of persons. This, although it is linked to a fundamental change, is not in itself a fundamental change. Most of the alterations in subsection 19(1) are directly related to business efficiencies of the company. The only change which does not fall into that category is under paragraph 19(1)(j), which allows a company to change to a company which has the capacity, rights, powers and privileges of a natural person; this is also the only change which currently does not require the court's approval. There seems to be no valid reason why alterations to the memorandum of association require the court's approval. Because the alterations do not result in fundamental changes to the company, and because they are related to business decisions of the company, requiring the court's approval would seem to contradict the tradition in companies law of leaving the direction of a company to the company itself, where the rights of shareholders and creditors will not be prejudiced. Allowing alterations to the memorandum of association by special resolution should be sufficient to protect the shareholders' interests.

The foregoing comments apply only to subsection 19(1) as it currently reads. If subsection 19(1) is amended to allow an alteration of the memorandum of association to change a company from limited liability to unlimited liability, this particular alteration should require approval by unanimous shareholder resolution, as discussed in Chapter 3 above.

E. RECOMMENDATION

For the reasons given above, we recommend that subsection 19(4) be amended to read to the following effect:

> (4) An alteration made pursuant to clause (j) [and (k), if the NSCA is amended to allow a company to change from limited to unlimited liability by way of a unanimous shareholders' resolution] of subsection (1) shall not take effect until and except insofar as it is approved by all of the members of the company, whether or not the shares held by them otherwise carry the right to vote, and where an alteration is made in this manner the company is subject to subsections (8) to (12) of Section 26.

Appendix "A"

Companies Act (Nova Scotia) ("NSCA")
Section 14 and subsections 19(1) to (7)

14 A company may not alter the conditions contained in its memorandum, except in the cases and in the mode and to the extent for which express provision is made in this Act.

19 (1) Subject to this Section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it to

(a) carry on its business more economically or more efficiently;

(b) attain its main purpose by new or improved means;

(c) enlarge or change the local area of its operations;

(d) carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;

(e) restrict or abandon any of the objects or powers specified in the memorandum or in subsection (4) of Section 26;

(f) sell or dispose of its undertaking, or any part thereof, for such consideration as it may think fit;

(g) distribute, subject to the provisions of this Act with respect to reduction of capital, any of its property in specie among its members;

(h) include among its objects or powers all or any of the powers, matters or things set out in subsection (4) of Section 26;

(i) amalgamate with any other company or body of persons; or

(j) change to a company which has, pursuant to subsection (8) of Section 26, the capacity, rights, powers and privileges of a natural person.

(2) Subsection (1) does not apply to a company which is incorporated on or after the first day of September, 1982, and clauses (a) to (i) of subsection (1) do not apply to a company which has altered its memorandum of association pursuant to clause (j) of subsection (1) and subsection (4).

(3) A company incorporated on or after the first day of September, 1982, or which has altered its memorandum of association pursuant to clause (j) of subsection (1) and subsection (4) may by special resolution alter its memorandum of association to restrict, further restrict or abandon restrictions on its objects and powers.

(4) An alteration made pursuant to subsections (1) and (2) or subsection (3) shall not take effect until and except in so far as it is

(a) confirmed on petition by the court; or

(b) in the case of an alteration made pursuant to clause (j) of subsection (1), approved by all of the members of the company, whether or not the shares held by them otherwise carry the right to vote, and where an alteration is made in this manner the company is subject to subsections (8) to (12) of Section 26.

(5) Before confirming the alteration the court must be satisfied that

(a) sufficient notice has been given to every holder of debentures of the company, and to any person or class of persons whose interest will, in the opinion of the court, be affected by the alteration; and

(b) with respect to every creditor who, in the opinion of the court, is entitled to object, and who signifies his objection in manner directed by the court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the court, but the court may, in the case of any person or class, for special reasons, dispense with the notice required by this Section.

(6) The court may make an order confirming the alteration, either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

(7) The court shall, in exercising its discretion under this Section, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the court for the purchase of interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement, provided that no part of the capital of the company may be expended in any such purchase.

Appendix "B"

Manitoba Corporations Act ("MCA")
Subsections 167(1) and (2)

167 (1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to

(a) change its name; or

(b) add, change or remove any restriction upon the business or businesses that the corporation may carry on; or

(c) change any maximum number of shares that the corporation is authorized to issue and change, if desired, the maximum consideration for which the shares may be issued; or

(d) create new classes of shares; or

(e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued; or

(f) reduce or increase its stated capital which, for the purposes of the amendment, is deemed to be set out in the articles; or

(g) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series; or

(h) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof; or

(i) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof; or

(j) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series; or

(k) revoke, diminish or enlarge any authority conferred under clauses (i) and (j); or

(l) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(m) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

Corporation with or without share capital

167 (2) The articles of a corporation may, by resolution, be amended

(a) to convert a corporation with share capital into a corporation without share capital; or

(b) to convert a corporation without share capital into a corporation with share capital; or

(c) to vary or remove any provision contained in the articles of a corporation without share capital, which states that upon dissolution its remaining property may be distributed among all the members or among the members of a class or classes of members, to one which states that upon dissolution the remaining property shall be distributed to an organization the undertaking of which is charitable or of a beneficial nature to the community.

7. FINANCING SHARE PURCHASES

A. INTRODUCTION

This chapter considers whether it would be appropriate under the NSCA to allow companies to assist in the financing of the purchase of their own shares without the solvency tests currently required by subsection 110(5) of the NSCA.

Provisions similar to subsection 110(5) in a number of other jurisdictions have been repealed or amended in recent years, due primarily to a backlash from the legal and accounting professions with respect to the difficulty of interpreting and meeting the solvency tests. This chapter will explore the reasons for which other jurisdictions have dispensed with, or amended, the solvency tests and whether their approach would be useful in Nova Scotia.

B. DISCUSSION

Subsections 110(5) and (6) of the NSCA, which govern the financing of share purchases, read as follows:

> Financing share purchases
>
> (5) Subject to this Section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person, other than the company, of any shares in the company where there are reasonable grounds for believing that
>
>> (a) the company is or, after giving the financial assistance, would be unable to pay its liabilities as they become due; or
>>
>> (b) the realizable value of the company's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the company's liabilities and paid-up capital of all classes.

Section does not prohibit

(6) Nothing in this Section shall be taken to prohibit

> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
>
> (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully paid shares in the company to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;
>
> (c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase fully paid shares in the company to be held by themselves by way of beneficial ownership.

Subsection 110(5) restricts a company from giving financial assistance to anyone other than the company for the purpose of purchasing shares of the company, where the company does not meet the liquidity and underlying assets tests set out in paragraphs 110(5)(a) and (b), respectively. Subsection 110(6) creates some limited exceptions to the restriction, where the financial assistance is given as part of the ordinary business of the company, where financial assistance is given for the purchase of shares to be held by a trustee for the benefit of employees, and where the company makes loans to employees in order to allow them to purchase shares as beneficial owners.

PURPOSE OF SUBSECTION 110(5) OF THE NSCA

Corporate statutes, both federal and provincial, have long included provisions which address the financing of share purchases. The discussion in this section concentrates on the former section 44 of the CBCA; the former section 42 of the ABCA; subsection 20(1) of the OBCA; section 42 of the SBCA as it read immediately prior to the 1992 amendments; sections 102 and 103 of the BCCA. These provisions were all similar, but not identical, to subsection 110(5) of the NSCA and have been amended or repealed. The main distinction between the CBCA-type statutes (all of the previously named statutes other than the BCCA) and the NSCA is that the CBCA-type statutes included related party financial assistance in their former financial assistance provisions, whereas subsection 110(5) is limited to financial assistance for the purchase of shares. Section 42 of the ABCA also drew a distinction between requirements for distributing corporations and non-distributing corporations. Because CBCA-type statutes combined related party financial assistance and financial assistance for the purchase of shares in one section, there has been a general expression of confusion in legal commentaries with respect to the purpose of the financial assistance provisions, related party assistance and share purchase assistance having different goals. However, the commentaries are still helpful insofar as they address the share purchase aspect of the financial assistance provisions.

Provisions allowing the financing of share purchases where a company meets a solvency test were introduced in Canadian and English legislation as a reaction to the common law rule against a company's trafficking in its own stock, first clearly laid out by the House of Lords in Trevor v. Whitworth.[22] The rule against trafficking was introduced for the protection of shareholders, and was subsequently adopted by Canadian courts.[23] There is some question as to whether the rule in Trevor v. Whitworth applies to all Canadian companies; however, this is irrelevant insofar as the common law has been overtaken by statute. A 1926 recommendation by the UK Greene Committee on corporate law resulted in an amendment to the UK Companies Act in 1929, prohibiting financial assistance for the purchase of shares, with certain limited exceptions.[24] This was the basis for section 56D of the Canadian Companies Act as introduced by the amendments of 1930, which also codified the absolute prohibition on financial assistance for the purchase of shares as stated in Trevor v. Whitworth, with similar exceptions.[25]

The 1962 UK Company Law Committee issued the "Jenkins Report", wherein it stated that "the policy behind prohibited financial assistance was primarily to protect creditors, and, additionally, to protect minority shareholders".[26] Based in part on the Jenkins Report, the 1975 CBCA financial assistance provisions replaced the existing prohibitions on share purchase financial assistance with solvency/assets tests[27], introducing what would become the controversial section 44 of the CBCA. The solvency/assets tests appear to have been an attempt to balance the competing interests of creditors and minority shareholders with those of the corporation. Under the new financial assistance provisions, the corporation would theoretically be able to participate in far more commercial transactions than it would have under the old prohibitions.

In his article on reforms of financial assistance provisions in CBCA-type model statutes, Wayne Gray separates the purposes ascribed to the related party and share purchase financial assistance prohibitions, stating that the "financial assistance restrictions are best seen as part of an integrated statutory matrix which is designed not only to prevent the dissipation of corporate assets to shareholders but also to establish specific remedies to facilitate the recovery of those assets".[28] Authors seem to agree that prohibitions on financial assistance for the purchase of shares have been added to corporate legislation in an effort to protect creditors and minority shareholders from an impairment of the company's capital, while allowing a company flexibility in its financial dealings where the solvency tests have been met.

---

[22] (1887) 12 App. Cas. 409, 57 L.J. Ch. 28.

[23] F.W. Wegenast, The Law of Canadian Companies (Toronto: Burroughs and Company, 1931) at 481.

[24] "Canada Business Corporations Act Discussion Paper: Financial Assistance and Related Provisions" (Ottawa: Industry Canada, Corporate Governance Board, 1996) at paras. 17 and 18 [the "CBCA Discussion Paper"].

[25] Ibid.

[26] Ibid. at para. 19.

[27] Ibid. at para. 21.

Suggested Reasons Why Prohibitions on Financial Assistance for Share Purchases Do Not Work

The Nova Scotia lawyers who made suggestions for provisions of the NSCA to be reviewed expressed strong concerns about the solvency tests in subsection 110(5), and, specifically, the inability to get accountants to "sign off" on the tests. It has been pointed out that the financial assistance rules are cumbersome and appear to serve very little purpose; that their ambiguity causes difficulty for lawyers and accountants who are asked to give opinions concerning compliance; and that the judicial pronouncements in Central and Eastern Trust Co. v. Irving Oil Co.[29], together with the nature of the Nova Scotia provision as a hybrid of the English restrictions and the CBCA solvency/assets test, warrant dramatic changes even absent developments elsewhere. Nova Scotia lawyers have suggested a complete repeal of the financial assistance rules or, at the very least, a clarification of the solvency tests to make them more workable.

These concerns echo those raised in other jurisdictions prior to the amendment or repeal of similar provisions. Part of the problem surrounding the solvency tests is that, in 1988, the Canadian Institute of Chartered Accountants advised accountants that they should not provide an opinion on matters related to solvency, which has resulted in companies finding it difficult to obtain an opinion from their accountants with respect to the solvency tests under corporate statutes. In relation to section 44 of the CBCA (reproduced here in Appendix "A"), this inability to obtain opinions regarding solvency was found to have resulted in an impediment to "legitimate financial transactions that directors would otherwise be willing to consider and that may be supportive of the competitiveness and long term viability of CBCA corporations".[30] Lawyers did not consider it appropriate to provide opinions on the solvency of a company, especially when accountants would not do so.

---

[28] Wayne D. Gray, "Reform of the Financial Provisions in CBCA-Type Model Statutes" (2002) 37 Can. Bus. L.J. 186 at 190.

[29] [1980] 2 S.C.R. 29. In that case, the Supreme Court of Canada found that a transaction was void as being contrary to the financial assistance provisions of the NSCA, because an agreement for the sale of shares of a company provided for the buyers (new shareholders) to obtain a mortgage with a third party and pay the proceeds to the vendor.

[30] Industry Canada: "Corporation and Insolvency Law Policy: Analysis of the Changes to the Canada Business Corporations Act", online: http://strategis.ic.gc.ca/epic/internet/incilp-pdci.nsf/en/h_c100269e.html at part 5 (date accessed: August 5, 2004). See also Industry Canada, News Release, "Federal Government re-introduces amendments to Corporate Statutes" (6 February 2001), online: http://www.ic.gc.ca/cmb/Welcomeic.nsf and Parliamentary Information and Research Service, Legislative Summary, LS-389E, "Bill S-11: an Act to amend the Canada Business Corporations Act and the Canada Cooperatives Act and to amend other Acts" (11 June 2001) online: http://www.parl.gc.ca/common/Bills_ls.asp?Parl=37&Ses=1&ls=S11.

The NSCA and the CBCA solvency tests prohibit(ed) financial assistance where:

> 44. (1) [Prohibited loans and guarantees] Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise
>
> [...]
>
> where there are reasonable grounds for believing that
>
> > (c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due, or
> >
> > (d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

One difficulty with the solvency test is that the expression "realizable value" is not defined, either in the NSCA or in CBCA-type statutes. "Realizable value" suggests a reflection of the present state of the company's finances, whereas financial statements prepared in accordance with generally accepted accounting principles reflect historical value. Until 1992, there was no discussion in the case law regarding the meaning of "realizable value". In Clarke v. Technical Marketing Associates Ltd. Estate (1992), 8 O.R. (3d) 734, the Ontario Court (General Division) interpreted the term "realizable value" in paragraph 44(1)(d) of the CBCA as "the price a willing and knowledgeable vendor and purchaser, neither acting under compulsion, would agree to" (at page 750). The court's discussion was quoted in Re Summer Fisheries Ltd. (1996), 40 C.B.R. (3d) 250, by the Nova Scotia Supreme Court [In Bankruptcy]. In that case, Registrar Smith adopted the Ontario Court's position that realizable value equals market value, which reinforces the difference between realizable value and the value as determined in accordance with generally accepted accounting principles.

A second problem is the determination of which assets should be excluded under the assets branch of the solvency tests where those assets will be pledged or encumbered to secure a guarantee as part of the financial assistance.[31] There has been some discussion surrounding this issue, but no resolution of the question. In the CBCA Discussion Paper (see supra note 23), it was recommended that, if section 44 were retained and amended, "where the financial assistance is in the form of assets pledged or encumbered to secure a guarantee, the amount excluded from the realizable value of the corporation's assets for the purpose of the assets test in paragraph 44(1)(d) is the lesser of the value of the assets or the full amount of the liability secured by the pledge or guarantee".[32]

---

[31] See the CBCA Discussion Paper, supra note 24, Appendix C at 3.

The CBCA Discussion Paper identifies a third difficulty with the solvency tests, recommending clarification with respect to the following: guarantees as liabilities; off-setting of indemnifications received from other parties; double counting of a secured guarantee. Other issues with respect to the calculation of a corporation's assets, according to the CBCA Discussion Paper, are whether prior and continuing financial assistance should be excluded from a calculation of the value of the assets, and whether taxes payable and transaction costs associated with the disposition of assets should be taken into account. The recommendation was for the exclusion of the prior and continuing financial assistance from the calculation of the value of the assets under section 44. Taxes and transaction costs were also to be left out, due to the already onerous solvency test, which would arguably be made even more difficult to satisfy with the additional calculation of income and capital gains tax liability.

Finally, the CBCA Discussion Paper raises the issue of the timing of the solvency tests, pointing out that because the solvency tests both use the conditional tense, the timing required is not completely clear. A practical interpretation put forward by some practitioners is that the tests must be met at the point at which the financial assistance is provided to the lender. The only other interpretation would require the tests to be met each time a payment was made by the borrower, which would result in a lack of certainty with respect to the enforceability of the financial assistance, since the tests could be met at one time and failed at another, later date.[33] We are not aware of any case law directly on point. The CBCA Discussion Paper includes a recommendation that section 44 be clarified to stipulate that the solvency tests need only be met at the time of entering into the contract for financial assistance.

In Alberta, concerns were raised with respect to section 42 of the ABCA (reproduced here in Appendix "B" along with its replacement, the current section 45), which has since been amended to replace the solvency tests with a duty to disclose. The application of the solvency tests in Alberta was found to be difficult, introduced uncertainty and expense, and inhibited legitimate commercial transactions, which is why it was ultimately replaced.[34]

---

[32] Ibid.

[33] Stewart, "Financial Assistance by Corporations – Statutory Prohibitions" (Oct. 1988) 7 Can Banking Newsletter 65 at 67, quoted in the CBCA Discussion Paper, Appendix C at 7.

[34] Financial Assistance by a Corporation: Section 42, the Business Corporations Act (Alberta) (Edmonton: Alberta Law Reform Institute, 1989) at 10-11 [the "Final Report"].

Section 44 of the CBCA, section 42 of the ABCA, subsection 20(1) of the OBCA, and section 42 of the SBCA are all more or less the same. Thus, the issues raised with respect to the ABCA and the CBCA applied to all of these jurisdictions, and the commentaries issued with respect to both were relied on by the other jurisdictions when implementing their own legislative changes.

In British Columbia, section 103 of the BCCA (reproduced here with section 102 in Appendix "C") prohibited the giving of financial assistance for the purchase of shares, with the exceptions of employee share purchases and the acquisition of shares by a person who would as a result of the acquisition own not less than 90% of the issued shares of a company, where the company was not a reporting company and the financial assistance was authorized by special resolution. If the proposed financing for the purchase of shares fell within one of the exceptions, the company still had to meet the solvency test set out in section 102, which required the company not to be insolvent at the time of giving the financial assistance or, in the case of a loan, that the giving of the loan would not render the company insolvent. This solvency test was considered unclear, given the difficulty of determining what would render a company insolvent, and it was replaced with a post-transaction disclosure regime.

REFORM OF SIMILAR PROVISIONS IN OTHER JURISDICTIONS

In preparation for an amendment or repeal of section 44 of the CBCA, the CBCA Discussion Paper presented several options for dealing with the concerns raised about the financial assistance provision. Some are not applicable to the NSCA given the differences between subsection 110(5) and section 44 of the CBCA, but the following options would benefit from further discussion in this context and will be canvassed below:

- Repeal section 44 [this was done];
- Replace solvency/assets test for share purchase financial assistance with an express authorization of financial assistance when made in the best interest of the corporation;
- Replace solvency/assets test with disclosure requirement; or
- Maintain status quo for both share purchase transactions and related party financial assistance; and
- In conjunction with any of the above options, amend CBCA section 288 to expressly define "complainant" to include a creditor for derivative remedy or derivative and oppression remedies [this was done].

The preliminary recommendation in respect of share purchase financial assistance outlined in the CBCA Discussion Paper was to maintain and clarify the section 44 solvency/assets test requirements, and exempt financial assistance transactions among all members of a wholly owned corporate group. The recommendation was also made to establish directors' liability for financial assistance made in contravention of the section, with the availability of a full due diligence defence, and address the enforceability of contracts made in contravention of the section by the corporation and a lender, creditor and other third party dealing with the corporation at arm's length in good faith without actual notice of the contravention. The authors of the CBCA Discussion Paper rejected the option of eliminating section 44 altogether, because the repeal might lead to more litigation and confusion regarding whether fiduciary duties of directors permit financial assistance; in other words, by removing the statutory provision regarding share purchase financing, corporations might have to resort to the common law approach of Trevor v. Whitworth. Section 44 was ultimately repealed in 2001.

Section 42 of the ABCA was replaced in 2000 by what is now section 45. Section 45 allows a corporation to give financial assistance to any person for any purpose, but requires disclosure to its shareholders of the financial assistance, with certain exceptions. All references to distributing corporations have been removed from the financial assistance provisions. To that extent, the Alberta government followed the recommendations put forward in the Final Report.[35]

Both Saskatchewan and Ontario were also influenced by the Final Report. In 1992, Saskatchewan replaced its prohibition on financing share purchases with the current section 42, which permits loans, guarantees, and other forms of financial assistance to related parties or to any person with respect to share purchases, so long as the company discloses the giving of financial assistance in accordance with disclosure rules set out in the section. In 1999, Saskatchewan added an exemption from the disclosure requirements for a corporation that is not a distributing corporation, and which gives financial assistance to employees for the purpose of constructing living accommodation, or for the purchase of shares to be held by a trustee on behalf of the employee. Otherwise, a corporation that is not a distributing corporation must disclose the financial assistance to all shareholders within 90 days after the transaction, and distributing corporations must disclose the same information in their annual financial statements. The SBCA has retained the "safe harbour" provisions, ensuring that a contract made in contravention of the financial assistance provisions may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

On March 27, 2000, Ontario also adopted a post-transaction disclosure to shareholders regime, allowing a corporation to give financial assistance to any person for any purpose, but requiring disclosure to shareholders of any material related party or share purchase financial assistance. Subsection 20(1) of the OBCA draws a distinction between the disclosure required for a private corporation and that required for a public corporation. Private corporations must disclose material financial assistance to all shareholders within 90 days after the transaction, whereas public corporations must disclose as part of their annual report to shareholders. The OBCA has also retained and expanded the "safe harbour" provisions, which ensure that a contract made in contravention of the financial assistance provisions is enforceable.[36]

---

[35] Ibid.

British Columbia has also adopted a permissive post-transaction disclosure regime. Section 195 of the BCBCA allows the giving of financial assistance by a company to any person, for any purpose and by any means, subject to the disclosure of material financial assistance given to a related party or with respect to the purchase of shares. There are certain exemptions from the disclosure requirements, specifically where the financial assistance is given in the ordinary course of business or to a non-arm's-length corporation. Disclosure may also be waived by the court.

POSSIBILITIES FOR REFORM OF SUBSECTIONS 110(5) AND (6)

Some of the options raised in the CBCA Discussion Paper are pertinent to the analysis of the reform of subsections 110(5) and (6) and are discussed here, with appropriate amendment.

1. REPEAL SUBSECTIONS 110(5) AND (6)

The main argument in favour of a repeal of subsections 110(5) and (6) is the elimination of the solvency tests and the related problems as outlined above, including the need for accountants' and lawyers' opinions regarding the state of a company's finances with respect to solvency. This argument is bolstered by the position put forth by many commentators that, despite a repeal of the financial assistance provisions, there would still be adequate protection for creditors and shareholders in the existing law. In discussions surrounding amendments to the CBCA-type statutes, commentators point to the statutory fiduciary duty of directors and their duty of care. These duties are not set out in the NSCA, although they are applicable through the common law.[37] The NSCA has, however, codified the duty of directors to disclose conflicting interests and to abstain from voting, in section 99. Also available to creditors and shareholders is the oppression remedy found in subsection 5(1) of the Third Schedule to the NSCA, and other general legislation with respect to fraudulent preferences and conveyances.

It is also argued that retaining the solvency tests would in effect be contrary to the nature of corporate law, by perpetuating a paternalism which is normally avoided. Courts and corporate statutes usually leave the mechanics of running a company to the company itself, and the solvency tests may be seen as an unwarranted interference.

Furthermore, it has been argued that shareholders would be adequately protected by the introduction of post-transaction disclosure regimes such as those in British Columbia, Saskatchewan, Ontario and Alberta.

---

[36] John A. Cross "Reform of the Corporate Financial Assistance Provisions in Ontario, Alberta and Federally" Miller Thomson LLP Banking and Insolvency Newsletter (Fall 2000) online: http://www.millerthomson.ca.
[37] See Re City Equitable Fire Insurance Company Ltd., [1925] 1 Ch. 407 (C.A.).

The main argument against a repeal of subsections 110(5) and (6) is that, by removing the prohibition on financial assistance as it is currently drafted, the Province would also be removing the only preventive measure protecting creditors and shareholders from a subsequent inability of a company to pay its debts. All other protection available to shareholders and creditors, either in statute or through the common law, is reactive and relies on obtaining remedies, either for the company itself or for a complainant directly. Furthermore, most of the discussions surrounding the financial assistance provisions in CBCA-type statutes do not draw a distinction between related party financial assistance and financial assistance for the purchase of shares. Arguably, these should be considered separately, as they have separate goals and effects. In his article, Wayne Gray argues that financial assistance for the purchase of shares "is a necessary part of the statutory regime intended to protect creditors and prohibit the issuance of partly paid shares"[38], and that the share purchase provisions do not have the same negative impact on a company's ability to take advantage of legitimate financial transactions as do the related party financial assistance provisions. Gray raises the spectre of a return to the common law doctrine set out in Trevor v. Whitworth as the likely outcome of a repeal of the share purchase financial assistance provisions. Gray argues that the present inability of corporations to issue partly paid shares and to accept a promissory note or promise to pay from a subscriber as consideration for the issuance of shares already blocks direct share purchase financial assistance, so that, without the statutory share purchase financial provisions, courts might hold that indirect financial assistance should also be blocked. However, Gray is writing within the context of the CBCA and CBCA-type statutes. Under the NSCA, a company may, in fact, issue partly paid shares.[39] Thus, there is at least some statutory allowance for direct financial assistance for the purchase of shares outside subsection 110(5), and it is not necessarily a foregone conclusion that courts dealing with an NSCA company would reach the same decision as that predicted by Gray in a CBCA-type jurisdiction.

If subsections 110(5) and (6) are repealed, it would nevertheless be advisable to address the Trevor v. Whitworth issue directly by replacing them with a provision which provides expressly that financial assistance for the purchase of shares is not prohibited.

2. REPLACE THE SOLVENCY TESTS WITH AN AUTHORIZATION FOR FINANCIAL ASSISTANCE WHERE IT IS IN THE BEST INTEREST OF THE COMPANY

To replace the solvency tests with a requirement for any financial assistance to be in the best interest of the company would retain the preventive aspect of the existing share purchase financial assistance provisions, as it would only allow the financial assistance once a certain threshold has been reached. However, by adopting a "best interest" approach, legislators would potentially be simply replacing one interpretative difficulty with another. This approach would require an interpretation of the phrase "in the best interest of the company" (instead of an interpretation of "realizable value"), which, unless it was defined in the NSCA, would most likely require recourse to the courts.

---

[38] Supra note 28 at 227.

[39] See ss. 52(1) and 109(3).

Having the courts involved in a determination of which transactions would be in the best interest a company would go against the tradition of companies law, which has generally minimized the involvement of the courts in a company's exercise of business judgment. Moreover, expressly requiring the financial assistance to be in the best interest of the company would be redundant, given directors' existing duty always to act in the company's best interest. An express requirement would conceivably add confusion to the existing regime.

3. REPLACE THE SOLVENCY TESTS WITH A DISCLOSURE REQUIREMENT

Saskatchewan, Alberta, Ontario and British Columbia have each adopted a new provision allowing financial assistance for any purpose, which would include the purchase of shares, so long as certain disclosure requirements are met. This approach allows for corporate flexibility with respect to transactions and financial planning, and the argument is that shareholders' interests are protected by the post-transactional disclosure of information. The problem with the disclosure requirement with respect to privately held companies, which are the majority of NSCA companies, is that creditors do not have access to the same notice and the financial assistance provisions were intended to protect not only shareholders but creditors as well. Nevertheless, creditors should be entitled to seek relief under the oppression remedy sections in the Third Schedule to the NSCA if the creditor later feels that it was prejudiced by the financial assistance. Aggrieved shareholders of course also have the right to make an application under those provisions.

In his 2002 article, Wayne Gray (see supra note 28) criticizes the substitution of the disclosure requirement for the financial assistance provisions. More recently, Mr. Gray recommended that the disclosure requirements in the OBCA should be repealed, following the federal lead. In a paper prepared for a meeting of the Ontario Bar Association Business Law Section held on May 16, 2005 he stated:

> Rather than perpetuate the confusing and, arguably, conceptually flawed financial assistance provisions, the time has come to follow the federal lead and repeal what is left of the OBCA financial assistance provisions. The CBCA, and its constituent corporations, have not been shown to be the worse as a result of the repeal of s.44.[40]

4. MAINTAIN THE STATUS QUO

Given the recent reform in other jurisdictions across Canada with respect to similar provisions, and the present dissatisfaction among companies and legal practitioners in Nova Scotia, it does not seem to be an option to retain subsections 110(5) and (6) without at least some form of amendment, if the Province decides not to repeal the provisions entirely.

---

[40] Wayne D. Gray, "The Rise and Fall of Ontario Corporate Law Competitiveness", paper presented to OBA Business Law Section session on Law Reform in Ontario: Tomorrow's Business Law, May 16, 2005 at 32.

5. AMEND THIRD SCHEDULE SUBSECTION 7(5)

As suggested in the CBCA Discussion Paper, no matter which of the above options the Legislature may choose, subsection 7(5) of the Third Schedule to the NSCA should be amended specifically to include creditors in the definition of "complainant". This will strengthen their ability to bring an action under the derivative and oppression remedy provisions. This clarification of "complainant" may also allow more flexibility with respect to any amendments to subsections 110(5) and (6), as it bolsters the protection of creditors outside the financial assistance provisions in a way that may be applied directly to any breach of those provisions.

C. RECOMMENDATIONS

We recommend that subsections 110(5) and (6) be replaced with a definition of financial assistance and an express statement that financial assistance may be permitted, similar to subsections 45(1) and (2) of the ABCA. While some may prefer the financial disclosure requirement of Saskatchewan, Alberta, Ontario and British Columbia, we recommend that there be no such restrictions on the ability of a company to provide financial assistance.

We also recommend that subsection 7(5) of the Third Schedule to the NSCA be amended to specifically include creditors in the definition of "complainant".

Appendix "A"

Canada Business Corporations Act ("CBCA")
Section 44

44. (1) [Prohibited loans and guarantees] Subject to subsection (2), a corporation or any corporation with which it is affiliated shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

(a) to any shareholder, director, officer or employee of the corporation or of an affiliated corporation or to an associate of any such person for any purpose, or

(b) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or affiliated corporation,

where there are reasonable grounds for believing that

(c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due, or

(d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

(2) [Permitted loans and guarantees] A corporation may give financial assistance by means of a loan, guarantee or otherwise

(a) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation;

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation;

(c) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate;

(d) to a subsidiary body corporate of the corporation; and

(e) to employees of the corporation or any of its affiliates

(i) to enable or assist them to purchase or erect living accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

(2.1) [Wholly-owned subsidiary] A corporation is a wholly-owned subsidiary of another body corporate for the purposes of paragraph (2)(c) if

(a) all of the issued shares of the corporation are held by

(i) that other body corporate,

(ii) that other body corporate and one or more bodies corporate all of the issued shares of which are held by that other body corporate, or

(iii) two or more bodies corporate all of the issued shares of which are held by that other body corporate; or

(b) it is a wholly-owned subsidiary of a body corporate that is a wholly-owned subsidiary of that other body corporate.

(3) [Enforceability] A contract made by a corporation in contravention of this Section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

Appendix "B"

Former Alberta Business Corporations Act ("ABCA")
Section 42, now repealed

42 (1) Except as permitted under subsection (2), a corporation shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise

(c) to a shareholder or director of the corporation or of an affiliated corporation,

(d) to an associate of a shareholder or director of the corporation or of an affiliated corporation, or

(e) to any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation,

if there are reasonable grounds for believing that

(f) the corporation is, or after giving the financial assistance would be, unable to pay its liabilities as they become due, or

(g) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan or in the form of assets pledged or encumbered to secure a guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

(2) A corporation may give financial assistance by means of a loan, guarantee or otherwise

(h) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,

(i) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,

(j) to a holding body corporate if the corporation is a wholly-owned subsidiary of the holding body corporate,

(k) to a subsidiary body corporate of the corporation, or

(l) to employees of the corporation or any of its affiliates

  (i) to enable or assist them to purchase or erect living accommodation for their own occupation, or

  (ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee.

(3) A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

(4) Unless disclosure is otherwise made by a corporation, a financial statement referred to in section 149(1)(a) shall contain the following information with respect to each case in which financial assistance is given by the corporation by way of loan, guarantee or otherwise, whether in contravention of

this section or not, to any of the persons referred to in subsection (1)(a), (b) or (c), if the financial assistance was given during the financial year or period to which the statement relates or remains outstanding at the end of that financial year or period:

(m) the identity of the person to whom the financial assistance was given;

(n) the nature of the financial assistance given;

(o) the terms on which the financial assistance was given;

(p) the amount of the financial assistance initially given and the amount, if any, outstanding.

Current Provisions of the Alberta Business Corporations Act ("ABCA")
Section 45

Financial assistance

45 (1) In this section, "financial assistance" means financial assistance by means of a loan, guarantee or otherwise.

(2) A corporation may give financial assistance to any person for any purpose.

(3) Subject to subsection (4), a corporation must disclose to its shareholders, in accordance with the regulations, financial assistance that the corporation gives to

(a) a shareholder or director of the corporation or of an affiliated corporation,

(b) an associate of a shareholder or director of the corporation of an affiliated corporation, or

(c) any person for the purpose of or in connection with a purchase of a share issued or to be issued by the corporation or an affiliated corporation.

(4) A corporation is not required to disclose to its shareholders financial assistance that it gives

(a) to any person in the ordinary course of business if the lending of money is part of the ordinary business of the corporation,

(b) to any person on account of expenditures incurred or to be incurred on behalf of the corporation,

(c) to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate,

(d) to a subsidiary body corporate of the corporation,

(e) to employees of the corporation or any of its affiliates

(i) to enable them to purchase or erect or to assist them in purchasing or erecting living accommodation for their own occupation, or

(ii) in accordance with a plan for the purchase of shares of the corporation or any of its affiliates to be held by a trustee, or

(f) to any person if all the shareholders have consented to giving the financial assistance.

(5) A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

Business Corporations Regulation
ALTA. REG. 118/2000

25.1 (1) A disclosure under section 45(3) of the Act must include the following information:

(a) the identity of the recipient of the financial assistance and the recipient's relationship to the corporation;

(b) a description of the financial assistance, which must include

(i) the nature and extent of the financial assistance given,

(ii) the amount of the financial assistance,

(iii) the terms on which the financial assistance was given, and
(iv) the purpose of the financial assistance.

(2) A corporation must make the disclosure required by section 45(3) of the Act by sending the information to be disclosed to the shareholders within 90 days after giving the financial assistance.

(3) A corporation must disclose to the shareholders any increase in the amount of the financial assistance and any changes to the terms on which the financial assistance was given within 90 days of the change.

(4) Where a disclosure required by section 45(3) of the Act has previously been made and the obligation of the recipient or the corporation in respect of the financial assistance is still outstanding, the corporation must place before the shareholders at each annual meeting a document disclosing

(a) the outstanding balance, as of the end of the most recent fiscal year of the corporation,

(i) on any loan made to the recipient by the corporation, or

(ii) on any loan of the recipient guaranteed by the corporation, and

(b) the nature and extent of any breach by the recipient of the recipient's obligation to repay the loan made by the corporation or whether any liability under a guarantee has been invoked in respect of a loan of the recipient guaranteed by the corporation.

Appendix "C"

British Columbia Companies Act ("BCCA") (now repealed)
Sections 102 and 103

Loans and guarantees prohibited

102 A company must not give financial assistance to a person, directly or indirectly, by way of loan, guarantee, the provision of security, or otherwise,

(a) if at the time of the giving of financial assistance the company is insolvent, or

(b) if, in the case of a loan, the giving of the loan would render the company insolvent,

and section 236 (2) applies to this section.

Financial assistance restricted

103 (1) A company must not give financial assistance to a person, directly or indirectly, by way of loan, guarantee, the provision of security, or otherwise,

(a) for the purpose of a purchase or subscription made or to be made by that person of, or for, shares of the company, or any debt obligations of the company carrying a right of conversion into or exchange for shares of the company,

(b) on the security, in whole or in part, of a pledge of or charge on shares of the company given by that person to the company, or

(c) in any other case, unless there are reasonable grounds for believing that, or the directors are of the opinion that, the giving of the financial assistance is in the best interests of the company.

(2) Despite subsection (1), a company, if previously authorized by special resolution and if there are reasonable grounds for believing that the giving of the financial assistance is in the best interests of the company, may

(a) provide money, in accordance with a scheme for the time being in force, for the subscription for or purchase of shares or debt obligations of the company by trustees, to be held by or for the benefit of a bona fide employee of the company or of an affiliate of the company, and

(b) provide financial assistance to bona fide full time employees of the company, or of an affiliate, to enable them to purchase or subscribe for shares or debt obligations of the company to be held beneficially by them.

(3) Despite subsection (1), if the financial assistance

(a) is given in connection with an acquisition of shares made or to be made by a person either alone or with the person's associates and, after the acquisition, not less than 90% of the issued shares of each class of shares in the capital of the company will be owned by that person and that person's associates, and

(b) is authorized by special resolution before it is given, a company that is not a reporting company may give financial assistance to or for the benefit of that person.

(4) If a company proposes to give financial assistance under subsection (3), any member of the company may, until 2 days before the meeting at which approval is sought, give a notice of dissent to the company in respect of the member's shares and, in that event, section 207 applies.

(5) Despite subsection (1), financial assistance may be given to or for the benefit of

(a) a wholly owned subsidiary by its holding company,

(b) its holding company by a wholly owned subsidiary,

(c) a company by another company, if both companies are wholly owned subsidiaries of the same holding company or are wholly owned by the same person, and

(d) the sole member of a company, by that company.

British Columbia Business Corporations Act ("BCBCA")
Section 195

Financial assistance

195 (1) In this section, "associate", if used to indicate a relationship with a person, has the same meaning as in section 192 (1), and includes a corporation of which the person beneficially owns shares carrying, in the aggregate, more than 1/10 of the votes that may be cast in an election or appointment of directors at a general meeting of the corporation.

(2) A company may give financial assistance to any person for any purpose by means of a loan, a guarantee, the provision of security or otherwise.

(3) Subject to subsections (4) and (5), a company must disclose, in accordance with subsection (7), any financial assistance that is material to the company and that the company gives to

(a) a person known to the company to be a shareholder of, a beneficial owner of a share of, a director of, an officer of or an employee of

(i) the company, or

(ii) an affiliate of the company,

(b) a person known to the company to be an associate of any of the persons referred to in paragraph (a), or

(c) any person for the purpose of a purchase by that person of a share issued or to be issued by the company or an affiliate of the company.

(4) A company need not make disclosure under subsection (3) in respect of financial assistance that is given

(a) to a person in the ordinary course of business, if the lending of money is part of the ordinary business of the company,

(b) to a person on account of expenditures incurred or to be incurred on behalf of the company,

(c) to a corporation of which the company is a wholly owned subsidiary,

(d) to a corporation that is a wholly owned subsidiary of the company,

(e) to a corporation if the company and the corporation are

  (i) wholly owned subsidiaries of the same holding corporation, or

  (ii) wholly owned by the same person,

(f) to the person, other than a corporation, who holds all of the shares of the company or of a corporation of which the company is a wholly owned subsidiary,

(g) to employees of the company or of any affiliate of the company to enable or assist them to purchase or erect living accommodation for their own occupancy, or

(h) to employees, or trustees for employees, of the company or of any affiliate of the company in accordance with a plan for the purchase of shares of the company or of any affiliate of the company to be beneficially owned by those employees.

(5) A company need not make disclosure under subsection (3) if that disclosure is waived by the court.

(6) The following information must be disclosed in respect of financial assistance for which disclosure is required under this section:

(a) a brief description of the financial assistance, including the nature and extent of the financial assistance given;

(b) the terms on which the financial assistance was given;

(c) the amount of the financial assistance given.

(7) The information required under subsection (6) must be disclosed

(a) in a written record deposited in the company's records office before or promptly after the giving of the financial assistance,

(b) in a consent resolution of the directors passed before or promptly after, or in order to authorize, the giving of the financial assistance,

(c) in the minutes of the directors' meeting at which the giving of the financial assistance is authorized, or

(d) in the minutes of the directors' meeting that follows the giving of the financial assistance.

(8) In addition to the records that a shareholder of the company may inspect under section 46, that shareholder may, without charge, inspect

(a) the portions of any minutes of meetings of directors, or of any consent resolutions of directors, that contain disclosures under this section, and

(b) the portions of any other records that contain those disclosures.

(9) In addition to the records a former shareholder of the company may inspect under section 46, that former shareholder may, without charge, inspect the records referred to in subsection (8) (a) and (b) of this section that relate to the period when that person was a shareholder.

(10) Sections 46 (7) and (8), 48 (1) and (3) and 50 apply to the portions of minutes, resolutions and records referred to in subsections (8) and (9) of this section.

8. CAPITAL OF CONTINUING COMPANIES

A. INTRODUCTION

One of the concerns raised by members of the Nova Scotia Bar[41] is the lack of certainty in the NSCA regarding the share capital of companies continuing into Nova Scotia. The purpose of this chapter is to examine the nature of the concern; review how legislation in other jurisdictions in Canada has addressed share capital for continued companies; and provide recommendations on how to eliminate this uncertainty in the NSCA.

B. NSCA

Continuances in Nova Scotia are governed by section 133 of the NSCA. Paragraph 133(4)(b) states:

> (4) From and after the continuance,
>
> (b) The share capital of the company shall be the existing share capital and the liability of shareholders thereon shall continue to be limited;

"Share capital" is not defined in the NSCA. It is not clear whether the reference to "share capital" in paragraph 133(4)(b) is authorized capital, issued capital or paid-up capital, or all or a combination of these forms of capital. As will be seen below, a review of legislation in other Canadian jurisdictions suggests the reference is to paid-up capital. However, the lack of a clear statement to this effect is a source of uncertainty for companies continuing into Nova Scotia.

Companies continuing into Nova Scotia have also expressed concern that the NSCA is not clear as to whether the paid-up or stated capital of the company to be continued into Nova Scotia will be the same following continuance as it was immediately prior to the export of the company from its original jurisdiction.

C. OTHER JURISDICTIONS

With the proclamation in March, 2003 of the BCBCA, Nova Scotia became the last memorandum of association jurisdiction in Canada. All other Canadian jurisdictions except Prince Edward Island have adopted a form of the CBCA model of corporate legislation. Prince Edward Island still uses a letters patent form.

---

[41] In response to the letter of October 9, 2002, from the Service Nova Scotia & Municipal Relations Liaison Committee, referred to in the introduction.

Section 26 of the CBCA addresses stated capital accounts. The key provisions of this section for purposes of continuances are as follows:

> 26. (1) A corporation shall maintain a separate stated capital account for each class and series of shares it issues.
>
> (2) A corporation shall add to the appropriate stated capital account the full amount of any consideration it receives for any shares it issues.
>
> (5) Where a corporation proposes to add any amount to a stated capital account it maintains in respect of a class or a series of shares, if
>
> > (a) the amount to be added was not received by the corporation as consideration for the issue of shares, and
> >
> > (b) corporation has issued any outstanding shares of more than one class or series,
>
> the addition to the stated capital account must be approved by a special resolution unless all of the issued and outstanding shares are shares of not more than two classes of convertible shares referred to in subsection 39(5).
>
> (6) When a body corporate is continued under this Act, it may add to a stated capital account any consideration received by it for a share it issued. . .
>
> (7) When a body corporate is continued under this Act, subsection (2) does not apply to the consideration received by it before it was so continued unless the share in respect of which the consideration is received is issued after the corporation is so continued.
>
> (8) When a body corporate is continued under this Act, any amount unpaid in respect of a share issued by the body corporate before it was so continued and paid after it was so continued shall be added to the stated capital account maintained for the shares of that class or series.

> (9) For the purposes of subsection 34(2), sections 38 and 42, and paragraph 185(2)(a), when a body corporate is continued under this Act its stated capital is deemed to include the amount that would have been included in stated capital if the body corporate had been incorporated under this Act.

Thus, a company continued under the CBCA has the option of adding to its stated capital account the consideration it received for shares issued prior to continuance (subsection 26(6)). However, if a company receives consideration for a share prior to continuance, but the share for which the consideration was received is issued following continuation, the full amount of the consideration must be added to the stated capital account of the class or series of share issued (subsection 26(7)). Further, any consideration received post-continuation must be added to the company's stated capital account, even if the share was issued prior to continuance (subsection 26(8)).

Pursuant to subsection 26(5), a company can add to the stated capital account of any class or series of shares amounts not received by the corporation as consideration for the issuance of shares. Thus, the amount listed in a stated capital account may or may not accurately reflect the historic amount contributed in exchange for the issuance of shares of that series or class.

Subsection 26(9) sets out the rule to be used for the basic financial tests (solvency and capital impairment) a company must meet prior to a share repurchase, dividend issuance, reduction of capital or amalgamation. The rule is simply that for these tests, the share capital of the continued company is equal to the amount the stated capital would have been if the company had originally been incorporated under the CBCA.

The rule set out in other Canadian jurisdictions is slightly different. For example, subsection 24(5) of the OBCA provides that:

> (5) Despite subsection (2), on the 29th day of July, 1983 or at such time thereafter as a corporation has been continued under this Act, as the case may be, the amount in the stated capital account maintained by a corporation in respect of each class or series of shares then issued shall be equal to the aggregate amount paid up on the shares of each such class or series of shares immediately prior thereto. . .

Subsection 28(10) of the ABCA states:

> (10) When a body corporate is continued under this Act, the stated capital of each class and series of shares of the corporation immediately following its continuance is deemed

> to equal the paid up capital of each class and series of shares of the body corporate immediately prior to its continuance.

The balance of jurisdictions in Canada follow the CBCA, OBCA or ABCA models for accounting for stated capital on continuances (with minor variations). The PEICA, the QCA and the BCCA are silent on the treatment of stated capital (or paid-up capital in the case of the QCA) on continuances. None of the corporate legislation in Canada discusses either authorized or issued capital in the context of continuances.

The NSCA embodies a concept of "paid-up capital" when discussing share capital. The balance of corporate legislation in Canada uses the "stated capital" concept.

Robert R. Pennington defines paid-up capital as:

> The total amount paid up by shareholders on the shares they [the shareholders] have taken.[42]

Professor J. Anthony Van Duzer defines "stated capital" as:

> Stated capital for a class or series is simply the historical total of the amount paid into the corporation in return for the issuance of shares of that class or series.[43]

Based on the foregoing definitions, it appears that paid-up capital and stated capital are essentially different terms for the same concept (i.e. – the historic amount paid to the company by shareholders for shares in the capital stock of the company). However, it is important to keep in mind that under the CBCA-style model of corporate legislation, stated capital accounts may change as a result of contributions of amounts received by the company other than as consideration for the issuances of shares.

D. RECOMMENDATION

We recommend that the NSCA be revised to include a provision, similar to those found in the CBCA, OBCA and ABCA, requiring a company to expressly state what the paid-up capital of a company continuing under Nova Scotia law is to be following continuance. As noted above, the NSCA embodies the concept of paid-up capital as opposed to stated capital. With this in mind, we recommend that paragraph 133(4)(b) of the NSCA be replaced with a provision of the following effect:

> (b) For the purposes of this subsection (4) of Section 133, "paid-up capital" shall be the aggregate amount of the consideration for the issue and allotment of shares of each

---

[42] Supra note 8 at 129.

[43] Supra note 9 at 207.

class and series of shares of the company and, for greater certainty, shall include all amounts included as paid-up capital or stated capital in the jurisdiction of the company immediately prior to continuance. The paid-up capital of each class and series of shares of the company immediately following its continuance shall be deemed to be equal to the paid-up capital of each class and series of shares of the company immediately prior to its continuance.

9. AUTHORIZED CAPITAL LIMITS

A. INTRODUCTION

Nova Scotia is one of two jurisdictions left in Canada (Prince Edward Island being the other) which prescribes that a company's constating documents must set out the company's maximum authorized capital. The purpose of this chapter is to review the historic basis for capping authorized capital; examine how other jurisdictions have addressed the maximum authorized capital issue; and provide a recommendation on whether the cap should remain a requirement under the NSCA or be replaced with a more flexible approach.

B. NSCA

Sections 10(a)(iv) – (vi) and 20(3) and (4) of the NSCA state:

> 10 In the case of a company limited by shares,
>
> (a) the memorandum must state
>
> (iv) the amount of share capital, if any, with which the company proposes to be registered, and the division thereof into shares of a fixed amount,
>
> (v) the total number of shares without nominal or par value which the company proposes to issue, if any, and
>
> (vi) where the shares are to be both with and without nominal or par value, particulars thereof in accordance with subclauses (iv) and (v);
>
> 20 (3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, must state the amount of share capital with which the company proposes to be registered.
>
> (4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration.

A cap on authorized capital is a carry-over from British company law, and originally served as a form of protection for investors. Professor Bruce Welling summarizes the concept as follows:

> There was some small measure of investor protection in the concept of authorized capital. An investor who purchased shares could do so knowing that his holdings would, barring constitutional amendment, represent at least a minimum proportion (his holdings divided by the total number of shares that the corporation was authorized to issue) of the total number of the corporation's shares.[44]

However, as Professor Welling notes, constitutional amendment could always be made, thus undermining the investor protection afforded by authorized capital. Additionally, pre-emptive rights found in many Canadian corporate statutes permit investors to protect their interests by having a right of first refusal on new share issuances.

In Nova Scotia, a cap on authorized capital also served a practical purpose prior to 1983. Annual fees payable pursuant to the Corporations Registration Act, R.S.N.S. 1989, c. 101, were calculated on the basis of the nominal capital of a company. The greater the nominal capital, the higher the annual fee becomes. However, since 1983 the annual registration fee is a fixed amount and not based on the nominal capital of a company. The amount now varies depending upon whether it is a company incorporated under the NSCA, an extra-provincial corporation or an unlimited liability company.

C. OTHER JURISDICTIONS

In Canadian jurisdictions other than Nova Scotia and Prince Edward Island, companies are permitted to cap authorized capital, but it is not mandatory to do so. For example, subsection 6(1) of the CBCA provides:

> 6. (1) Articles of incorporation shall follow the form that the Director fixes and shall set out, in respect of the proposed corporation,
>
> (c) the classes and any maximum number of shares that the corporation is authorized to issue,

Reforms in the 1970's and 1980's in most Canadian jurisdictions eliminated the requirement to specify a limit on authorized capital. The question came down to whether the cap served any useful purpose. Canadian legislators, almost without exception, determined that authorized capital limits did not serve a useful purpose. For this reason, in most jurisdictions in Canada, companies are entitled to have an unlimited authorized capital.

---

[44] Bruce L. Welling, Corporate Law in Canada, 2nd ed. (Toronto: Butterworths, 1991) at 609.

Other Canadian jurisdictions have sought to protect the interests of investors by including in their corporate legislation pre-emptive rights which grant current shareholders the right to purchase proposed new share offerings in proportion to their holdings at the time of the issuance. For example, section 28 of the CBCA states:

> 28 If the articles so provide, no shares of a class shall be issued unless the share has first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.
>
> (2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued
>
> (a) for consideration other than money;
>
> (b) as a share dividend; or
>
> (c) pursuant to the exercise of conversion privileges, options or rights previously granted by the corporation.

D. RECOMMENDATION

We recommend the elimination of the requirement that companies incorporated under the NSCA specify a limit on their authorized capital. The cap currently serves no practical purpose under Nova Scotia law. It is not in line with other jurisdictions in Canada, an issue that frequently arises when companies continue into Nova Scotia. Further, investors may be more suitably protected by pre-emptive provisions similar to those found in the CBCA.

With this in mind, we recommend that paragraphs 10(a)(iv) to (vi) of the NSCA be revised to the following effect:

> 10 In the case of a company limited by shares,
>
> (a) the memorandum must state
>
> (iv) for each class and series of shares with or without nominal or par value, the maximum number of the shares of that class or series of

> shares that the company is authorized to issue, or state that there is no maximum number;

Further, we recommend the deletion of subsections 20(3) and (4) of the NSCA and the inclusion of a pre-emptive right section similar to section 28 of the CBCA. We recommend this provision be inserted as section 51A and read to the following effect:

> 51A If the articles so provide, no shares of a class shall be issued unless the shares have first been offered to the shareholders holding shares of that class, and those shareholders have a pre-emptive right to acquire the offered shares in proportion to their holdings of the shares of that class, at such price and on such terms as those shares are to be offered to others.
>
> (2) Notwithstanding that the articles provide the pre-emptive right referred to in subsection (1), shareholders have no pre-emptive right in respect of shares to be issued
>
> (a) for consideration other than money;
>
> (b) as a share dividend; or
>
> (c) pursuant to the exercise of conversion privileges, options or rights previously granted by the company.

Consideration should be given to amending paragraph 134(3)(c) of the NSCA to read to the following effect:

> 134 (3) The amalgamation agreement shall further set out
>
> (c) for each class and series of shares with or without nominal or par value, the maximum number of shares of that class or series of shares that the company is authorized to issue, or state that there is no maximum number.

10. SPECIAL RESOLUTIONS AND SHAREHOLDERS' AND DIRECTORS' MEETINGS

A. SPECIAL RESOLUTIONS

Under the NSCA, a special resolution must be passed by no fewer than three-quarters of the members present at a general meeting, and this resolution must be confirmed at a subsequent meeting by a majority of members present:

> 87 (1) A resolution passed by a company shall be deemed to be special whenever it has been passed by a majority of not less than three fourths of such members of the company entitled to vote as are present in person or by proxy, where proxies are allowed, at any general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given, and such resolution has been confirmed by a majority of such members entitled to vote as are present in person or by proxy, where proxies are allowed, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month, from the date of the first meeting.

Alternatively, under subsection 92(1), a special resolution is valid if it is in writing and signed by every shareholder who would be entitled to vote on the resolution at a meeting. The current state of the law under the NSCA raises two issues which need to be addressed: namely, whether the confirmatory meeting for a special resolution is necessary, and whether the threshold of three-quarters of the shareholders is appropriate.

In every other jurisdiction in Canada other than British Columbia, Quebec and Prince Edward Island, a special resolution requires no fewer than two-thirds of the votes of shareholders in order to pass. There is no reference to a special resolution under the QCA. The PEICA refers to special resolutions but does not provide a definition. Under the BCBCA, the definition of a special resolution is more complicated, and combines the old requirement for three-quarters of the vote with a more modern approach allowing a company to choose a percentage from two-thirds to three-quarters. The BCBCA also provides for a special separate resolution, which is the equivalent of a special resolution for holders of a class or series of shares:

> 1(1) in this Act:
>
> "special majority" means, in respect of a company,
>
> (a) the majority of votes that the articles specify is required for the company to pass a special resolution at a general

meeting, if that specified majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution, or

(b) if the articles do not contain a provision contemplated by paragraph (a), 2/3 of the votes cast on the resolution or, if the company is a pre-existing company that has not complied with section 370 (1) (a) or 436 (1) (a) or that has a notice of articles that reflects that the Pre-existing Company Provisions apply to the company, 3/4 of the votes cast on the resolution;

"special resolution" means

(a) a resolution passed at a general meeting under the following circumstances:

> (i) notice of the meeting specifying the intention to propose the resolution as a special resolution is sent to all shareholders holding shares that carry the right to vote at general meetings at least the prescribed number of days before the meeting;
>
> (ii) the majority of the votes cast by shareholders voting shares that carry the right to vote at general meetings is cast in favour of the resolution;
>
> (iii) the majority of votes cast in favour of the resolution constitutes at least a special majority, or

(b) a resolution passed by being consented to in writing by all of the shareholders holding shares that carry the right to vote at general meetings;

"special separate resolution" means

(a) a resolution passed at a class meeting or series meeting under the following circumstances:

> (i) notice of the meeting specifying the intention to propose the resolution as a special separate resolution is sent to all shareholders holding shares of that class or series of shares at least the prescribed number of days before the meeting;
>
> (ii) the majority of the votes cast by shareholders voting shares of the class or series of shares is cast in favour of the resolution;

(iii) the majority of votes cast in favour of the resolution constitutes at least

(A) the majority of votes that the memorandum or articles specify is required for shareholders holding shares of that class or series of shares to pass a special separate resolution, if that specified majority is at least 2/3 and not more than 3/4 of the votes cast on the resolution, or

(B) if the memorandum or articles do not contain a provision contemplated by clause (A), 2/3 of the votes cast on the resolution or, if the company is a pre-existing company that has not complied with section 370 (1) (a) or 436 (1) (a) or that has a notice of articles that reflects that the Pre-existing Company Provisions apply to the company, 3/4 of the votes cast on the resolution, or

(b) a resolution passed by being consented to in writing by all of the shareholders holding shares of the applicable class or series of shares;

Thus, in this as in other areas of corporate law, the BCBCA uses a hybrid system. There is no clear rationale for this, although it has the effect of accommodating companies incorporated under the BCCA and at the same time allowing the flexibility of choice in those companies wishing to bring their internal procedures in line with the current practice in most other Canadian jurisdictions.

RECOMMENDATION

It is recommended that the current requirement for three-quarters of the votes of shareholders to constitute a special resolution be reduced to two-thirds, if for no other reason than to reduce the number of inconsistencies between the NSCA and the majority of other Canadian statutes. The requirement to have two-thirds of the votes of members still requires more than a simple majority, thereby still affording adequate protection of the interests of shareholders.

B. CONFIRMATORY MEETINGS

It has been suggested by some members of the Nova Scotia bar that confirmatory meetings serve no practical purpose, since at the original meeting the special resolution must be passed by three-quarters of the shareholders present, which is already a strong majority.

The reason for the confirmatory meeting is presumably to protect shareholders who are not present at the first meeting from the passing of a resolution with which they do not agree and which may be detrimental to their interests. However, such protection is already built in to the definition of special resolutions, which require notice to be given to all shareholders specifying the intention to propose the resolution as a special resolution at a general meeting. Thus, all shareholders should be aware of the contents of any resolution passed and should be able to protect their interests without the need for a confirmatory meeting.

RECOMMENDATION

Given that no other jurisdiction in Canada requires a confirmatory meeting, and given that it does not seem to serve any useful purpose, we recommend that the requirement for the confirmatory meeting be removed from the NSCA.

C. ELECTRONIC MEETINGS

Currently, there is no provision in the NSCA allowing for meetings of shareholders or directors to be held by electronic means. Some Canadian jurisdictions do allow electronic meetings; others do not seem to go quite as far, although they do allow more flexibility than simply requiring meetings to be held in person.

With respect to shareholders' meetings, the OBCA allows meetings to be held by telephonic or electronic means. The BCBCA allows participation by telephone or other communications media if all participants are able to communicate with each other. The CBCA allows meetings to be held by telephonic, electronic or other communications facility that permits all participants to communicate adequately with each other during the meeting. The SBCA allows meetings by telephone or other communication facilities if all participants are able to communicate adequately with each other during the meeting. The NBBCA, the YBCA, the NTBCA, and the ABCA all allow meetings by means of telephone or other communication facilities which permit all participants to hear each other.[45] The MCA, the PEICA, the NLCA and the QCA do not address shareholders' meetings.[46]

With respect to directors' meetings, the OBCA, the BCBCA and the CBCA allow meetings by telephone or other communications medium if the participants are able to communicate with each other. The NBBCA, the NLCA, the YBCA, the NTBCA, the ABCA[47], the SBCA, the MCA, and the QCA allow meetings by means of telephone or other communication facilities which permit all participants to hear each other.[48]

---

[45] Alberta's Bill 16 will allow shareholders' meetings to take place by electronic means, telephone, or other communication facilities that permit all participants to hear or otherwise communicate with each other (see s. 28 of Alberta's Bill 16).

[46] See OBCA s. 94(2); BCBCA s. 174(1); CBCA s. 132; SBCA s. 126(2.1); NBBCA s. 85(3); YBCA s. 133(3); NTBCA s. 133(3); and ABCA s. 131(3).

[47] Alberta's Bill 16 will allow directors' meetings to take place by electronic means (see s. 23 of Alberta's Bill 16).

RECOMMENDATION

Most of the jurisdictions in Canada have turned their attention to the issue of modernizing their statutes to reflect technological advances. To facilitate meetings of shareholders and directors, who are frequently not present in the same jurisdiction, it would be advisable for the NSCA to be amended to allow for meetings to take place by telephone or by electronic means which allow instantaneous communication. There should also be a provision deeming a shareholder or director who participates in a meeting by such means to have been present at the meeting.

---

[48] See OBCA s. 126(13); BCBCA s. 140(1); CBCA s. 114(9); NBBCA s. 72(8); NLCA s. 188(1); YBCA s. 115(7); NTBCA s. 115(7); ABCA s. 114(9); SBCA s. 109(9); MCA s. 109(9); and QCA s. 89.2.

11. DOCUMENTS TO BE AVAILABLE AT THE REGISTERED OFFICE

A. NOVA SCOTIA

All Canadian corporate legislation requires certain documents to be kept at the registered office of the companies or corporations incorporated pursuant to that legislation. Some statutes allow exceptions to the general rule, which will be discussed below. In Nova Scotia, the following must be kept at the registered office:

- a register of members (subsections 42(1) and 43(1));
- all books containing minutes of proceedings of general meetings (subsection 90(1));
- a copy of all written directors' resolutions (subsection 91(2));
- a copy of all written shareholders' resolutions (subsection 92(2));
- a register of directors, officers, and managers (subsection 98(1));
- a register of debenture holders (subsection 111(1)); and
- financial statements of each of the company's subsidiary bodies corporate and any other body corporate, the accounts of which are consolidated in the financial statements of the company (Third Schedule, Section 10).

There are other documents and records which must be kept at the registered office or at some other place designated by the directors. For example, see Section 120 with reference to the "proper books of account" and Section 11 of the Third Schedule for a central register of securities.

The NSCA allows branch registers of both members and debenture holders to be kept outside the province (see subsections 46(1) and 111(5)). For ease of reference, the relevant provisions of the NSCA are attached as Appendix "A".

Subsections 43(1) and 90(1) of the NSCA require the register of members to be kept at the registered office of the company and to be available for inspection by members of the public. This does not cause a problem with privately held companies, since their shares are transferable at the registered office. However, in the case of public companies where the transfer agent is a trust company, the transfer of shares does not normally take place at the registered office, and it has been suggested that allowing the register of members or a copy of the register to be kept elsewhere than at the registered office, at a location either inside or outside the province, would facilitate such companies' business practices. The question to be addressed in this chapter is whether a removal of the restrictions on the location of the register of members is warranted, and whether any similar change should be made with respect to the other documents required to be held at the registered office.

B. OTHER JURISDICTIONS

The CBCA allows a securities register, which is essentially the same as a register of members under the NSCA, to be kept at the registered office or any other place in Canada designated by the directors; further, corporate records may be kept outside Canada provided the records are available for inspection, by means of a computer terminal or other technology, during regular office hours at the registered office or at any other place in Canada designated by the directors and there is assistance available to conduct such a search. Corporate records include the articles and by-laws of a corporation, all amendments thereto, a copy of any unanimous shareholder agreement, minutes of meetings and resolutions of shareholders, copies of certain required notices, accounting records, minutes of meetings and resolutions of the directors. For ease of reference, the relevant provisions of the CBCA are attached as Appendix "B".

The NBBCA, the NLCA and the SBCA require the share register and the corporate records as described in the CBCA to be kept at the registered office or elsewhere in the province. The ABCA, the BCBCA and the NTBCA require the share register and other corporate records to be kept at the corporation's records office, which is the registered office if not otherwise designated by the directors.[49] The ABCA includes in its corporate records the articles and by-laws, and amendments thereto, copies of unanimous shareholder agreements and amendments thereto, minutes of meetings and resolutions of shareholders, copies of certain notices, copies of financial statements and reports, a register of certain disclosures, accounting records, and records containing minutes of meetings and resolutions of the directors. The BCBCA requires a long list of documents to be kept at its records office, including the documents required by other Canadian jurisdictions to be kept at the registered office. The NTBCA requirements for corporate records are similar to the ABCA. The MCA requires the share register and other corporate records to be kept at the registered office and/or any other place in Manitoba designated by the directors. The MCA includes in its corporate records the following: the articles and by-laws and all amendments thereto, a copy of any unanimous shareholder agreement, minutes of meetings and resolutions of shareholders, a register of directors, accounting records, and records containing minutes of meetings and resolutions of the directors. The OBCA requires the share register and other corporate records as described in the MCA to be kept at the registered office or elsewhere in Ontario designated by the directors, if the records are available for inspection at the registered office by means of a computer terminal or other electronic technology during regular business hours. Under the QCA and the PEICA, the share register and other corporate records must be kept at the company's head office.[50] The QCA includes in its corporate records the articles and by-laws, a unanimous agreement of shareholders, minutes of proceedings of meetings and resolutions of shareholders, a directors' register, and minutes of proceedings of the meetings and resolutions of the board of directors and the executive committee. The PEICA includes in its corporate records a copy of the letters patent incorporating the company, all by-laws, the names, addresses, calling of, and the number of shares of stock held by, each shareholder, the amounts paid in and remaining unpaid on the stock of each shareholder, all transfers of stock, and the names, addresses and calling of all directors of the company.

---

[49] Alberta's Bill 16 will allow a corporation to keep some or all of its corporate and accounting records at a place outside Alberta if the records are available for examination, by means of computer terminal or other technology, during regular hours at the registered office or any other place in Alberta designated by the directors, and the company provides the technical assistance required for such examination (see s. 10 of Alberta's Bill 16).

C. DISCUSSION AND RECOMMENDATION

Historically, Canadian companies were inconsistent with the information and documents kept in the company's minute books. There was no express statutory requirement for a company to keep books of account, for example, until 1930.[51] However, more modern versions of the various statutes governing corporations and companies in Canada have increased the detail with which they address the issue of corporate records. Most jurisdictions require at the very least a current copy of all corporate records to be kept within the jurisdiction; the rationale for this seems to be linked to the issue of enforceability. Where the records are kept within the jurisdiction, it is easier to enforce the right to inspect the records.

Most jurisdictions in Canada other than Nova Scotia allow flexibility in the location of the share register, so long as the location is controlled by the directors of the company. Most of these jurisdictions, however, continue to restrict the location of the records to within Canada and in most cases, within the applicable province.

Given that there are situations where it would be more convenient and efficient to have the share register of a company and other corporate documents held at a location other than the registered office, and given that there is no apparent need to retain the share register at the registered office, it is recommended that the Province consider relaxing the restrictions of location with respect to the register. An amendment should be made to the NSCA allowing the share register and other documents to be kept at a location in Canada other than the registered office, where such location is designated by the directors. It would also be desirable to require the register and other documents, if located somewhere other than the registered office, to be accessible via computer terminal at the registered office during business hours. This will allow all records of the company to be accessible from the registered office at all times, even if not physically present at that office.

---

[50] See CBCA s. 20(1); NBBCA s. 18(1); NLCA s. 36; SBCA s. 20(1); ABCA ss. 21(1), (7); BCBCA s. 42(1); NTBCA ss. 19(7), 21(1); MCA ss. 20(1), (5); OBCA ss. 140 (1), 141(1), 144(3); QCA s. 123.111; PEICA s. 50.

[51] See F.W. Wegenast, supra note 23 at 794.

Appendix "A"

Companies Act (Nova Scotia) ("NSCA")
Sections 42(1), 43(1), 46(1), 79(1), 90(1), 91(2), 92(2), 98(1), 111(1) and 111(5)

Register of members

42(1) Every company shall keep in one or more books or in any other manner a register of its members and enter therein the following particulars:

(a) he names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital, a statement of the shares held by each member and of the amount paid or agreed to be considered as paid on the shares of each member;

(b) he date at which each person was entered in the register as a member;

(c) he date at which any person ceased to be a member.

(2) If a company fails to comply with this Section it shall be liable to a penalty not exceeding twenty-five dollars for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall be liable to the like penalty.

Access to register of members

43(1) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall, during business hours, subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on payment of twenty-five cents or such less sum as the company may prescribe, for each inspection.

(2) Any member or other person may require a copy of the register, or of any part thereof, on payment of fifteen cents, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.

(3) If any inspection or copy required under this Section is refused, the company shall be liable for each refusal to a penalty not exceeding ten dollars, and to a further penalty not exceeding ten dollars for every day during which the refusal continues, and every director and manager of the company who knowingly authorizes or permits the refusal shall be liable to the like penalty, and the court may by order compel an immediate inspection of the register.

(4) A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year.

(5) No proceedings shall be commenced under this Section without the leave in writing of the Attorney General.

Mistakes or rectifications or damages

44(1) If

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court by motion for rectification of the register, and the court may either refuse the application or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

(2) On application under this Section the court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

Branch register of members

46(1) A company having a share capital may, if so authorized by its articles, cause to be kept in any place outside of the Province a branch register of members, hereinafter in this Section called a "branch register of members".

(2) The company shall give to the Registrar notice of the situation of the office where any branch register is kept, and of any change in its situation, and of the discontinuance of the office in the event of its being discontinued.

(3) A branch register of members shall be deemed to be part of the company's register of members, hereinafter in this Section called the "principal register of members".

(4) A branch register of members shall be kept in the same manner in which the principal register of members is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulated in the district wherein the branch register of members is kept.

(5) The company shall transmit to its registered office a copy of every entry in its branch register of members as soon as may be after the entry is made, and shall cause to be kept at its registered office, duly entered up from time to time, a duplicate of its branch register of members, and the duplicate shall for all the purposes of this Act be deemed part of the principal register of members.

(6) Subject to the provisions of this Section with respect to the duplicate of the branch register, the shares registered in a branch register of members shall be distinguished from the shares registered in the principal register of members, and no transaction with respect to any shares registered in a branch register of members shall, during the continuance of that registration, be registered in any other register.

(7) On the death of a member registered in a branch register of members, the shares of the deceased member shall be transferable on the duplicate of the branch register at the registered office of the company and not elsewhere.

(8) The company may discontinue to keep any branch register of members, and thereupon all entries in that register shall be transferred to some other branch register of members kept by the company in the same country, or to the principal register of members.

(9) Subject to this Act, any company may by its articles make such provisions as it may think fit respecting the keeping of branch registers of members.

Registered office in Province

79(1) Every company shall as from the day on which it begins to carry on business or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office in the Province, to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office, and of any change therein, shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the Registrar, who shall record the same, and the notice shall, where possible, state the street and number where the registered office is situated, or shall otherwise sufficiently identify the situation of the office.

(3) If a company carries on business without complying with this Section it shall be liable to a penalty not exceeding twenty-five dollars for every day during which it so carries on business.

Location and accessibility of minute books

90(1) The books containing the minutes of proceedings of any general meeting of a company held on or after the first day of August, 1935, shall be kept at the registered office of the company, and shall during business hours, subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that no less than two hours in each day be allowed for inspection, be open to the inspection of any member without charge.

Without meeting

91(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of proceedings of the directors or committee thereof, as the case may be.

Shareholder resolutions without meeting

92(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of proceedings of shareholders.

Record of pertinent facts

98(1) Every company shall keep at its registered office a register containing the names and addresses of its directors, officers and managers, and send to the Registrar a copy thereof, and from time to time notify the Registrar of any change among its directors, officers or managers.

Register of debenture holders

111(1) Every company shall keep or cause to be kept in one or more books at the registered office of the company a register of the holders of debentures which have been or may be on or after the first day of August, 1935, issued by the company and which are not validly and completely transferable solely by the delivery thereof, and shall enter therein the following particulars:

(a) the names and addresses and the occupations, if any, of the holders of debentures which have been or may be on or after the first day of August, 1935, issued by the company, and which are not validly and completely transferable solely by the delivery thereof;

(b) the date at which the name of any person was entered in the register as such holder; and

(c) the date at which any person ceases to be such holder.

(5) A company may, if so authorized by its articles, cause to be kept in any place outside of the Province a branch register of the holders of debentures which have been or may be on or after the first day of August, 1935, issued by the company, and which are not validly and completely transferable solely by the delivery thereof, hereinafter in this Section called a "branch register of debenture holders".

Appendix "B"

Canada Business Corporations Act ("CBCA")
Sections 20(1), (2) and (5.1)

20(1) A corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, records containing

(a) the articles and the by-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement;

(b) minutes of meetings and resolutions of shareholders;

(c) copies of all notices required by section 106 or 113; and

(d) a securities register that complies with section 50.

Directors records

(2) In addition to the records described in subsection (1), a corporation shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committee thereof.

When records or registers kept outside Canada

(5.1) Despite subsections (1) and (5), but subject to the Income Tax Act, the Excise Tax Act, the Customs Act and any other Act administered by the Minister of National Revenue, a corporation may keep all or any of its corporate records and accounting records referred to in subsection (1) or (2) at a place outside Canada, if

(a) the records are available for inspection, by means of a computer terminal or other technology, during regular office hours at the registered office or any other place in Canada designated by the directors; and

(b) the corporation provides the technical assistance to facilitate an inspection referred to in paragraph (a).

12. ACCESS TO THE SHARE REGISTER

A. NOVA SCOTIA

In Nova Scotia, access to the register of members is available to anybody, and anybody may make a copy of the register for a small charge. Refusal to allow access to the register makes the company and any director and manager of the company who knowingly authorized or permitted the refusal liable for a small penalty. If a person wishes to commence a proceeding for a remedy with respect to the refusal of access, that person must first obtain leave in writing of the Attorney General. These requirements are set out in section 43 of the NSCA, the relevant portions of which read as follows:

> Access to register of members
>
> 43 (1) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall, during business hours, subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on payment of twenty-five cents or such less sum as the company may prescribe, for each inspection.
>
> Copies from register
>
> (2) Any member or other person may require a copy of the register, or of any part thereof, on payment of fifteen cents, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied.
>
> Refusal to allow inspection
>
> (3) If any inspection or copy required under this Section is refused, the company shall be liable for each refusal to a penalty not exceeding ten dollars, and to a further penalty not exceeding ten dollars for every day during which the refusal continues, and every director and manager of the company who knowingly authorizes or permits the refusal shall be liable to the like penalty, and the court may by order compel an immediate inspection of the register.
>
> [. . .]

> Leave required
>
> (5) No proceedings shall be commenced under this Section without the leave in writing of the Attorney General.

Nova Scotia is the only Canadian jurisdiction to require an intervention on the part of the Attorney General for relief where access to the share register has been denied.

B. OTHER JURISDICTIONS

Pursuant to section 21 of the CBCA, shareholders and creditors of a corporation, their personal representatives and the director may examine the securities register and may take extracts from the records; any other person may do so on payment of a reasonable fee, where the corporation is a distributing corporation. A contravention of this section constitutes an offence punishable on summary conviction to a maximum fine of $5,000.00 or to six months imprisonment or to both. Pursuant to sections 247 and 248, where there has been non-compliance with any section of the CBCA, a person may apply to the court for an order directing compliance, and that application may be made in a summary manner. Similar provisions exist in the NBBCA, the NLCA, the ABCA, the MCA, the OBCA, the SBCA and the NTBCA.

Under the BCBCA, there are specific remedies provided on denial of access to the securities register or register of members. Pursuant to subsection 50(1), a person who claims to be entitled to inspect the securities register or to receive a copy of it may apply in writing to the registrar for an order under subsection (2), which may require the company to provide to the registrar either a copy of the register, or an affidavit of a director or officer of the company setting out why the applicant is not entitled to obtain access to the register or a copy of it. The registrar must include in any order made an explanation of the basis on which the claim is made, and must furnish a copy of the order to the company and to the applicant. Where the applicant receives an affidavit from the registrar of a director or officer of the company setting out why the applicant is not entitled to access to the records, or where the company does not comply with an order of the registrar within fifteen days after the date of the order, the applicant may, on notice to the company, apply to the court for an order that the applicant be provided with the requested access to the records. The court may then make the order it considers appropriate. For ease of reference, the relevant provisions of the BCBCA are set out in Appendix "A" to this section.

A person may also apply to the court for a compliance order pursuant to section 228, which is a more general section similar to those available in the other CBCA-type statutes mentioned above. Pursuant to section 235, this application may be made without notice.

Neither the QCA nor the PEICA contains any reference to a compliance order provision. However, pursuant to section 53 of the PEICA, any director or officer who refuses access to the company's records is guilty of an offence punishable on summary conviction to a maximum of $50.00 plus costs.

We have not found a discussion of the historical reasons for allowing or disallowing public access to a company's share register in any Canadian jurisdiction.

C. DISCUSSION

Either of the methods described above, under the CBCA-type statutes or the BCBCA, would provide a more direct and easily accessible remedy to a breach of section 43 of the NSCA than that which is currently in place. There is no obvious reason why the requirement for the participation of the Attorney General should be retained. Arguably, it is a waste of the Province's resources to require the Attorney General's involvement in a proceeding arising from a breach of section 43. Although a general application to the court for an order directing compliance, which is contemplated by both the CBCA-type statutes and the BCBCA, provides a reliable and more easily accessible method of enforcing the access provisions than is currently available under the NSCA, the BCBCA approach to a denial of access to the share register is the more user friendly. Allowing an application to the registrar for relief provides a straightforward, quick, and presumably inexpensive way of obtaining a compliance order. It would also serve as a filter to the court's system, similar to that which is presumably contemplated by the use of the Attorney General under the NSCA. By using the registrar instead of the Attorney General, the application is kept within the system put in place by the Province to address issues relating to companies, as opposed to directing an essentially mundane request to the Province's senior legal advisor. The BCBCA clearly sets out steps to be followed by both the applicant and the registrar upon a denial of access to the share register, and contemplates recourse to the courts only when these steps do not result in the applicant obtaining a compliance order.

As previously noted, Nova Scotia allows any person to seek to examine the share register. Most other Canadian legislation restricts this to directors, shareholders and creditors and their personal representatives, unless the corporation is a distributing corporation (or a reporting issuer or a reporting company). If the corporation is a distributing corporation, any person may seek to obtain a list of shareholders, number of shares, addresses, etc. In order to guard against inappropriate requests for inspection of the register, any amendments to the NSCA should include a similar restriction of access to directors, shareholders and creditors and their personal representatives.

D. PRIVACY CONSIDERATIONS

Part 1 of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"), deals with the protection of personal information in the private sector by organizations that engage in commercial activities, and the collection, use and disclosure of that information.

"Personal information" is defined in section 2 of PIPEDA as "information about an identifiable individual...". PIPEDA stipulates that personal information may only be collected, used and disclosed with the consent of the person to whom the information pertains. The NSCA requirement for a share register to be publicly available containing the name and address of each shareholder appears on the face of it to conflict with PIPEDA.

Section 7 of PIPEDA creates exceptions to the general rule that information may only be collected, used and disclosed with consent. One such exception is where the information is "publicly available and is specified by the regulations". Paragraphs 1(b) and 1(c) of the Regulations Specifying Publicly Available Information, S.O.R.\2001-7, state as follows:

> 1(b) Personal information including the name, title, address and telephone number of an individual that appears in a professional or business directory, listing or notice, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice;
>
> 1(c) Personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorized by law, where the collection, use or disclosure of the personal information relate directly to the purpose for which the information appears in the registry;

It seems that the information required to be kept in the share register would fall into either category of information contained in paragraphs (b) and (c). Thus, section 43 of the NSCA does not need to be amended in order to bring it into line with PIPEDA.

E. RECOMMENDATION

We recommend that the NSCA adopt the approach taken in the BCBCA, and that subsection 43(5) be repealed and replaced with a provision allowing recourse to the Registrar where there has been a breach of the provisions allowing access to the share register, following in general the approach taken under the BCBCA. We also recommend the addition of a provision allowing an application to the court for a compliance order in a summary manner, as included in the CBCA-type statutes and the BCBCA.

We also recommend that only the Registrar, directors, shareholders and creditors of a company and their personal representatives be permitted to examine the share register, unless the company is a distributing corporation. In the case of a distributing corporation, any person should be entitled to obtain a list setting out the names of the shareholders of the company, the number of shares owned by each and the address of each shareholder or member.

Appendix "A"

British Columbia Business Corporations Act ("BCBCA")
Section 50

50(1) A person who claims to be entitled under section 46, 47, 48 or 49 to obtain a list, to inspect a record or to receive a copy of a record, may apply in writing to the registrar for an order under subsection (2) of this section if that person is not provided with the list, given access to the record or provided with a copy of the record.

(2) If, on the application of a person referred to in subsection (1), it appears to the registrar that the company, the person who maintains the records office for the company or the person who has custody or control of its central securities register has, contrary to this Division, failed to provide a list to the applicant, give the applicant access to a record or provide the applicant with a copy of a record, the registrar may order the company to provide to the registrar whichever of the following the company considers appropriate:

(a) the list or a certified copy of the record;

(b) an affidavit of a director or officer of the company setting out why the applicant is not entitled to obtain

(i) the list, or

(ii) access to or a copy of the record.

(3) The registrar must

(a) set out in any order made under subsection (2) an explanation of the basis on which the applicant claims to be entitled to obtain the list, access to the record or a copy of the record, and

(b) furnish a copy of that order to the company and the applicant.

(4) The company referred to in an order made under subsection (2) must comply with that order within 15 days after the date of the order.

[. . .]

(7) An applicant under subsection (1) may, on notice to the company, apply to the court for an order that the applicant be provided with a list, access to a record or a copy of a record, if

(a) an affidavit respecting the list or record is furnished to the applicant by the registrar under subsection (6), or

(b) the company fails to comply with subsection (4).

(8) Without limiting the power of the registrar under section 422(1)(c), the court may, on an application under subsection (7) of this section, make the order it considers appropriate and may, without limitation, do one or more of the following:

(a) make an order that a list or access to a record be provided to the applicant, or that a certified copy of a record be provided to the applicant, within the time specified by the order;

(b) make an order directing the company to do one or both of the following:

  (i) change the location of the records office of the company to a location that the court considers appropriate;

  (ii) replace the person who maintains the records office for the company or who has custody or control of its central securities register;

(c) order the company to pay to the applicant damages in an amount that the court considers appropriate;

(d) order the company, the person who maintains the records office for the company or the person who has custody or control of its central securities register or some or all of them to pay to the applicant the applicant's costs of and related to the application.